## TABLE OF CONTENTS.


PAGE

Index of Authorities Cited ..... iv

PETITION:

I. The situation in the lower courts ..... 2

A. The proceedings sought to be reviewed ..... 2

B. The nature of the suit ..... 4

C. The facts ..... 4

D. The decision of the District Court ..... 9

E. The decision of the Circuit Court of Appeals ..... 11

II. The questions presented ..... 13

A. Can an owner who is not entitled to limit its liability because it is privy to the unseaworthiness of the vessel, nevertheless rely on provisions of the special contract of the bill of lading? ..... 13

B. May a shipowner who has breached a fundamental condition of the contract of carriage on its part, by failing to furnish a vessel seaworthy and capable of performing the voyage, retain the prepaid freight? ..... 14

PAGE

C. Does the departure of a vessel in a condition of unseaworthiness, such as to make her incapable of performing the voyage at least without extensive repairs, constitute a deviation? ..... 14

D. Was the abandonment of the voyage proximately caused by the vessel's unseaworthiness which continued as an active operating agency at least until January 14, 1918? ..... 15

III. Reasons for granting this application ..... 16

A. The Circuit Court of Appeals for the Second Circuit has wrongly decided an important question concerning deviation in a way which is in conflict with the decisions of this court and with a decision of the Circuit Court of Appeals for the Third Circuit ..... 16

B. The Circuit Court of Appeals for the Second Circuit has wrongly decided an important question of maritime law concerning proximate cause in a way which is in conflict with the decisions of this court and with a decision of the Circuit Court of Appeals for the Third Circuit ..... 16

C. The effect of initial unseaworthiness on the special contract of the bill of lading generally and on the prepaid freight clause in particular, is an important question of maritime law which has never been, but should be, settled by this court ..... 16

PAGE

D. All the questions presented are of great commercial importance to all concerned in sea-borne commerce ..... 17

IV. Accompanying documents ..... 17

APPENDIX TO PETITION ..... 21

BRIEF IN SUPPORT OF PETITION ..... 33

FIRST POINT—The Decision of the Circuit Court of Appeals herein is contrary to the weight of authority, including the decisions of this court, in respect to the effect of a breach of warranty of seaworthiness on the special contract of the bill of lading ..... 34

SECOND POINT—The Circuit Court of Appeals erroneously held that the adventure was frustrated by the Governmental embargo ..... 37

THIRD POINT—The Circuit Court of Appeals erroneously held that the schooner *Malcolm Baxter, Jr.*, was not guilty of a deviation ..... 40

LAST POINT—The prayer of the petitioners should be granted ..... 44

## Index of Authorities Cited.


| | PAGE |
|---|---|
| Allanwilde Transp. Corp. v. Vacuum Oil Co., 248 U. S. 377 | 14, 37 |
| Atlantic Shipping & Trading Co. v. Louis Dreyfus & Co., [1922] 2 A. C. 250 | 35, 36 |
| Baxter's Leather Co. v. Royal Mail Steam Packet Co., [1908] 2 K. B. 626 | 35 |
| Bris, The, 248 U. S. 392 | 14 |
| Burn Line, Ltd. v. U. S. & A. Steamship Co., 162 Fed. 298 | 35 |
| Caledonia, The, 157 U. S. 24 | 16 |
| Caze v. Baltimore Ins. Co., 7 Cranch 358 | 35 |
| Citta di Messina, The, 169 Fed. 472 | 43 |
| Edwin I. Morrison, The, 153 U. S. 199 | 34 |
| G. R. Booth, The, 171 U. S. 450 | 16 |
| Gibaud v. Great Eastern Ry. Co., [1921] 2 K. B. 426 | 40 |
| Gracie D. Chambers, The, 248 U. S. 387 | 14 |
| Henry W. Cramp, The, Appendix to Petition | 13, 16, 21, 40, 41 |
| Isle of Mull, The, 278 Fed. 131 | 38 |
| Kish v. Taylor, [1912] A. C. 604 | 15 |
| Lawrence v. Minturn, 17 How. 111 | 40 |
| Mobile, etc., R. R. Co. v. Jurey, 111 U. S. 584 | 40 |
| National Steam Nav. Co. v. International Paper Co., 241 Fed. 861 | 35 |
| Sarnia, The, 278 Fed. 459 | 40 |
| St. Johns N. F. Shipping Corp. v. Companhia Geral Commercial do Rio De Janeiro, 263 U. S. 119 | 16, 41, 43 |
| St. Paul, The, 277 Fed. 99 | 43 |

PAGE

Tattersall *v.* National S. S. Co., 12 Q. B. D. 297 ..... 35
Texas Company *v.* Hogarth, 265 Fed. 375, 267 Fed. 1023, 256 U. S. 619 ..... 38
Thorley *v.* Orchis S. S. Co., [1907] 1 K. B. 660 ..... 40
Tornado, The, 108 U. S. 342 ..... 34

U. S. *v.* Hall, 6 Cranch 171 ..... 16

Wiener & Co. *v.* Wilson's, etc., Line, 15 Com. Cas. 294 ..... 35
Willdomino, The, 272 U. S. 718 ..... 12, 15, 16, 41, 42, 44

SUPREME COURT OF THE UNITED STATES.

| | |
|---|---|
| REPUBLIC OF FRANCE, COMPAGNIE FRANCO-INDO-CHINOISE and ENGINEERING TIMBER COMPANY, LTD., *Petitioners (Claimants-Appellees below)*, **against** FRENCH OVERSEAS CORPORATION, as owner of the schooner *Malcolm Baxter, Jr.*, *Respondent (Petitioner-Appellant below)*. | No. October Term, 1927. |
| IN THE MATTER *of* The petition of FRENCH OVERSEAS CORPORATION, as owner of the schooner *Malcolm Baxter, Jr.*, for limitation of liability. | |

## PETITION FOR CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

*To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Your petitioners, The Republic of France, Compagnie Franco-Indo-Chinoise and Engineering Timber Company, Ltd., respectfully show to this court as follows:

## I. The Situation in the Lower Courts.

### A.

This is a petition for *certiorari* by claimants in a limitation of liability proceeding who were all shippers of cargo on board the American schooner *Malcolm Baxter, Jr.*

The writ of *certiorari* is sought to review a final decision in admiralty of the Circuit Court of Appeals for the Second Circuit (R. 1165-1171), which modified the decision of the United States District Court for the Southern District of New York, rendered by Judge Knox (R. 301-313).

The case is not officially reported. The opinion of the Circuit Court of Appeals by Judge Campbell is reported in 1927 American Maritime Cases 1053.

The Courts below have finally disposed of all questions of fact in favor of the petitioners.

As to the legal results flowing from those facts the Courts below have differed.

The case is now brought here to correct what your petitioners believe to be serious errors of law in the decision of the said Circuit Court of Appeals.

The principal questions of law involved are of the greatest importance and interest to ocean borne commerce. They are as follows:

1. Whether a breach of the warranty of seaworthiness on sailing, so flagrant as to force both Courts below to refuse to allow the shipowner to limit his liability, has any

effect on bill of lading clauses in favor of the ship owner, such as the clause allowing him to retain prepaid freight?

The Court of Appeals held that the shipowner might retain his freight under the bill of lading notwithstanding he was in privity with unseaworthiness which caused the end of the adventure.

2. Whether a deviation due wholly to such initial unseaworthiness is excusable as an involuntary deviation?

The Court of Appeals held that a deviation due to an initial unseaworthiness to which the shipowner was in privity was "an involuntary deviation".

3. Whether the doctrine of frustration of adventure by "Restraint of Princes" may be invoked by a party to a contract whose breach of the essential warranty of seaworthiness was the proximate cause of bringing the vessel within the operation of the restraint?

The Court of Appeals held the shipowner might invoke the equitable defense of frustration notwithstanding the fact that the initial unseaworthiness, with which the shipowner was in privity was the sole cause of bringing the vessel within the "restraint".

Your petitioners believe that the Circuit Court of Appeals for the Second Circuit has decided these important questions of law wrongly, and in conflict with the decisions of this Court and with fundamental principles of maritime law of far reaching importance.

B.

Upon libels being filed by your petitioners against the schooner *Malcolm Baxter, Jr.*, to recover damages resulting from the schooner's failure to perform the contract voyage from New Orleans, Louisiana, to Bordeaux, France, in the latter part of 1917, the respondent, French Overseas Corporation, owner of the schooner *Malcolm Baxter, Jr.*, filed a petition for limitation of and exoneration from liability and enjoined further proceedings under the libels.

The libelants filed claims in this limitation proceeding in substance similar to their libels, claiming damages on the ground that the voyage was abandoned by reason of the schooner's unseaworthiness on sailing and her structural incapability to perform the contract voyage. They also filed answers setting up the same facts as a ground why limitation of and exoneration from liability should be denied.

C.

The facts are as follows:

The schooner *Malcolm Baxter, Jr.*, loaded her cargo at New Orleans in July and August, 1917 (R. fols. 769, 773).

The petitioners were the owners and consignees of practically the entire cargo of the schooner, as follows:

Republic of France, 617 steel billets; 455 hogsheads of tobacco;

Compagnie Franco-Indo-Chinoise, 4076 bags malt; 4000 bags of cornstarch;

Engineering Timber Company, Ltd., 12991 pieces of spruce lumber.

For these goods the schooner issued clean bills of lading for carriage from New Orleans to Bordeaux (R. pp. 221-224), which contained the following provision:

> "Also that freight prepaid will not be returned goods lost or not lost. Prepaid freight is to be considered as earned on shipment of the goods and is to be retained by vessel's owner, vessel or cargo lost or not lost, or if there be a forced interruption or abandonment of the voyage at a port of distress or elsewhere * * *" (R. pp. 221-224, fol. 904).

Upon shipment of the cargo, these petitioners paid the following freight:

| | |
|---|---|
| Republic of France | $40,224.30 |
| Compagnie Franco-Indo-Chinoise | 57,723.20 |
| Engineering Timber Company, Ltd. | 11,706.68 |

(R. fols. 2444, 2450, 2453, 2531).

Both of the lower courts have found that, before the voyage commenced, the *Malcolm Baxter, Jr.*, was so structurally defective and so unseaworthy as to be incapable of performing the voyage without extensive repairs; that her defective and unseaworthy condition was discoverable by the exercise of due diligence; and that the French Overseas Corporation, as owner of the schooner, failed to exercise due diligence, or to make any attempt to discover the vessel's condition before she broke ground for the voyage. (R. pp. 307, 310, 1167, 1168).

The evidence shows, and the District Court found, that the schooner's owner never made any attempt to ascertain her condition before loading the cargo and commencing the voyage (R. fols. 573, 308, 309, 118, 148, 127).

Both of the lower courts have held that the French Overseas Corporation, as owner of the schooner, was inexcusably guilty of a breach of the warranty of the vessel's seaworthiness (R. pp. 310, 1168).

The schooner left New Orleans on August 16, 1917, and was towed down to Port Eads, at the mouth of the Mississippi River (R. fols. 826, 827).

On arrival at Port Eads, her master discovered that the schooner had already developed a steady leak in the forward end of the vessel; and he realized then that the schooner was unseaworthy (R. fols. 774, 775).

The schooner did not sail from Port Eads until August 23, 1917, and her master then sailed out into the Gulf, expecting that it would be necessary to put into some Gulf or Atlantic Coast port for repairs (R. fols. 775-779).

Three days later, although the schooner had encountered weather so calm that she had barely made steerage way, the leak increased to such serious proportions that her master subsequently put into the port of Key West (R. fols. 784, 827-834, 783).

The Board of Survey which examined the schooner at Key West reported that she was incapable of proceeding on the voyage without extensive repairs. (Exhibit D, R. pp. 232-235; Exhibit B, R. p. 294); and recommended that the schooner be towed to an Atlantic Coast port for repairs. The owner, contrary to that recommendation, had the vessel towed to Havana, Cuba, where she arrived on September 23, 1927 (R. fol. 682).

The schooner was subsequently drydocked and examined at Havana, and the surveyors there reported that the schooner was unable to proceed on the voyage without extensive repairs (Exhibit H, R. pp. 239-241).

The structural defects found at Key West and Havana must have existed before the voyage commenced, because there is no evidence to account for their causation at any later time. Indeed, the Circuit Court of Appeals held, at the outset of Judge Campbell's opinion, that the schooner "was unseaworthy when she left New Orleans" (R. p. 1168).

Repairs were carried on over a period of about four months at Havana, and the schooner was not able to reattempt the voyage at least until January 14, 1918 (R. fols. 636-7, 683).

Both of the lower courts have found that in the interim the United States government, *on September 28, 1917*, issued an order forbidding the clearance of any sailing vessel for

a voyage through the submarine zone (R. pp. 302, 311, 1167).*

Upon the completion of repairs at Havana, *no application* for a clearance was made on behalf of the schooner *Malcolm Baxter, Jr.* (R. fol. 262). Her owner, French Overseas Corporation, merely notified the several shippers of cargo that the vessel would return to New York and redeliver the cargo there, and that was subsequently done (R. fols. 135, 690).

After the *Malcolm Baxter, Jr.*, had delivered the cargo to the shippers at New York, it was found that some of the shipments had received damage while on board the schooner, and the shippers incurred expenses for the reconditioning of that damage.

---

* Exports Administrative Board

1435 K Street, N. W.

September 28, 1917

No Licenses for Any Proposed Shipments for Sailing Vessels Going Through the War Zone.

The Exports Administrative Board, in accordance with requests made by the United States Shipping Board and by the Navy Department has instructed the Director of the Bureau of Export Licenses not to grant licenses for any proposed shipments by sailing vessels going through the war zone. It is, of course, obvious that steamers can navigate the war zone with less danger than slow sailing craft, and sailing ships, if used in safer waters, would to an extent release steam vessels now used in such waters.

The attention of shippers is, therefore, called to the fact that clearance will be refused sailing vessels destined to proceed through the war zone regardless of the fact that the goods themselves may have already been licensed. Licenses will be granted in the future for shipments to European countries only on condition that the goods are to be shipped by some vessel other than a sailing vessel. The Board will revoke licenses covering goods to be shipped through the war zone if any shippers attempt to ship them by sailing vessel (R. p. 206).

Before the cargo was returned to the shippers, the owner of the schooner made a demand upon the shippers for deposits to cover general average contributions to the alleged sacrifices and expenses of the schooner while in the ports of refuge of Key West and Havana, and certain of the shippers actually made the deposits so demanded (R. fols. 988-990, 999, 1005, 1010, 1011).

Some consignments of the cargo were forwarded by steamer from New York to Bordeaux, at a rate of freight in excess of that originally paid to the schooner. Efforts to forward the balance of the cargo were unsuccessful and it was disposed of in this country for the best price obtainable (R. fols. 2279, 2280, 2281, 2284-5, 2294, 2298, 2300, 2396, 2407).

D.

The District Court, after a careful examination of all the testimony offered found:

a. that the evidence showed beyond dispute that the schooner was structurally defective and unseaworthy when the voyage commenced, so that she was incapable of performing the contract voyage (R. fols. 919-920, 935);

b. that the schooner's structural defects and incapability of performing the voyage could have been discovered, had the owner or its representatives made any effort to discover them (R. fols. 929, 930);

c. that the owner failed to make any effort to discover the condition of the vessel before the voyage commenced (R. fols. 922, 929);

d. that the owner was guilty of a breach of the warranty of seaworthiness (R. fols. 919, 934);

e. that the departure from the voyage by the schooner when she put into Key West and Havana was a direct consequence of her original unseaworthy and defective condition (R. fols. 932-936);

f. that "at no time prior to September 28, 1917, the date upon which the governmental embargo went into effect, was the *Baxter* ready, able and willing to perform her contract" (R. fol. 933);

g. that the proximate and continuing cause of the abandonment of the adventure was the owner's original breach of warranty of seaworthiness, in failing to provide a vessel capable of performing the voyage (R. fols. 935-6); and

h. that, by reason of the foregoing facts, the owner of the *Malcolm Baxter, Jr.*, was responsible to the cargo owners for the entire damages sustained by the latter, including the return of the prepaid freight, without any right on the part of the owner of the schooner to limit liability (R. fol. 936).

E.

On appeal by the owner of the schooner to the Circuit Court of Appeals for the Second Circuit, the latter court *affirmed* the findings of the District Court:

a. that the schooner was unseaworthy before the commencement of the voyage (R. p. 1168);

b. that her unseaworthiness was discoverable *before* the commencement of the voyage, by the exercise of due diligence (R. p. 1168);

c. that the owner had failed to exercise due diligence to discover the vessel's unseaworthiness (R. p. 1168);

d. that the owner of the schooner was not entitled to limitation of liability (R. p. 1168); and

e. that the owner of the schooner, having been guilty of a breach of the warranty of seaworthiness, should respond to the cargo owners for the damages resulting from that breach (R. p. 1168).

On the question of liability, and the right to limit liability, the French Overseas Corporation, as owner of the schooner, *was unsuccessful in both the lower courts.*

The Circuit Court of Appeals, however, held that although the vessel was unseaworthy when she left New Orleans and the owner could have discovered that fact by the exercise of due diligence, there was no deviation. In

spite of the decision of this court in *The Willdomino* (1927), 272 U. S. 718, 727, that a departure from a contract voyage cannot be excused by an emergency arising out of "gross negligence," the Circuit Court of Appeals sought to make the following distinction:

> "If the circumstances under which the ship leaves port are such that it must be known that she will be compelled to deviate, e. g., a shortage of fuel, the deviation is voluntary. If, however, the ship leaves port unseaworthy, which includes one badly stowed, even if it was known, she does not voluntarily deviate if she seeks a port of refuge" (R. p. 1170).

The Circuit Court of Appeals, moreover, ruled that the governmental order of September 28, 1917, was the effective cause of the frustration of the voyage and that, therefore, the cargo owners should not recover any damages resulting from the vessel's abandonment of the voyage, nor receive any refund of the freight which they had prepaid to the *Malcolm Baxter, Jr.*, on the faith of the owner's warranty of seaworthiness (R. p. 1171).

A petition by the cargo owners to the Circuit Court of Appeals for the Second Circuit for re-argument was denied, although that court in denying that petition clarified its original ruling to the extent of damages recoverable, on account of the breach of the warranty of seaworthiness, and left to the District Court the disposition of the costs in that court (R. p. 1191).

The result of this modification by the Circuit Court of Appeals of the damages recoverable by the cargo owners

is to relieve the owner of the *Malcolm Baxter, Jr.*, from the greater part of the damages sustained by the cargo and to reduce the cargo's recovery from $391,741.26, including interest, to an amount not yet fixed but which is likely to be about one-fourth of that sum.

The decision of the Circuit Court of Appeals permits the shipowner to retain the prepaid freight amounting to $109,654.18 (R. pp. 221-224) notwithstanding that the schooner because of unseaworthiness was always wholly incapable of making the voyage for which the freight was paid.

Your petitioners respectfully submit that the decision of the District Court herein was sound in law and should have been affirmed in all respects by the Circuit Court of Appeals.

They further submit that the decision of the Circuit Court of Appeals is contrary to decisions of this honorable court, is contrary to sound established principles of the maritime law of this country, and is in direct conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *The Henry W. Cramp* (Appendix to Petition).

## II. The Questions Presented.

A. Can an owner who is not entitled to limit its liability because it is privy to the unseaworthiness of the vessel, nevertheless rely on provisions of the special contract of the bill of lading?

Although the Circuit Court of Appeals held the shipowner, because of its culpable failure to perform its war-

ranty of seaworthiness, not entitled to limit its liability, the court nevertheless held the shipowner entitled to rely on the defense of restraints of princes and also on the prepaid freight clause of the bill of lading. It is submitted that in this respect the decision is unsound and inconsistent with the doctrine laid down by this court in *Allanwilde Transp. Corp.* v. *Vacuum Oil Co.*, 1919, 248 U. S. 377; *The Gracie D. Chambers*, 1919, 248 U. S. 387, and *The Bris*, 1919, 248 U. S. 392. Those decisions rested expressly on the condition that the shipowner came into court with clean hands.

B. May a shipowner who has breached a fundamental condition of the contract of carriage on its part, by failing to furnish a vessel seaworthy and capable of performing the voyage, retain the prepaid freight?

A shipowner who fails to carry cargo to destination is not entitled to retain prepaid freight, except upon a special agreement to the contrary with the cargo in the contract of carriage.

The Circuit Court of Appeals held that the owner of the *Malcolm Baxter, Jr.*, was entitled to retain the prepaid freight under the contractual provisions of the bills of lading, in spite of its finding that the owner had breached the warranty of seaworthiness which formed the very basis of the agreement on which the cargo owners parted with their freight money.

C. Does the departure of a vessel in a condition of known unseaworthiness, such as to make her incapable of performing the voyage at least without extensive repairs, constitute a deviation?

The Circuit Court of Appeals has held that it does not; and seeking to rely on *Kish* v. *Taylor* [1912] A. C. 604, has drawn a distinction between a deviation necessitated by shortage of fuel and a deviation necessitated by structural incapability of performing the voyage, which it is submitted is unsound and in conflict with the decision of this court in *The Willdomino* (1927), 272 U. S. 718.

The Circuit Court of Appeals went so far as to hold that the owner's complete disregard of its obligation to furnish a seaworthy vessel or to use due diligence to attempt to make the vessel seaworthy did not amount to gross negligence within the rule of this court in *The Willdomino* (1927), 272 U. S. 718.

D. Was the abandonment of the voyage proximately caused by the vessel's unseaworthiness which continued as an active operating agency at least until January 14, 1918?

The Circuit Court of Appeals has held that the alleged governmental embargo rendered sailing illegal, frustrated the adventure and excused the shipowner from performance. This conclusion was rested on the ground that the *embargo* was not the result of the *unseaworthiness* of the ship (R. pp. 1170-1171); whereas the real question presented is whether the *abandonment of the contract voyage* was the result of the *unseaworthiness* of the ship. The court's reasoning disregards the undisputed fact that the unseaworthiness of the vessel brought her within the operation of the embargo, which otherwise would not have entered into the situation at all.

## III. Reasons for Granting This Application.

It is respectfully submitted that this court should take up this case on *certiorari*, set aside the decision of the Circuit Court of Appeals, and restore the decision and decree of the District Court on the following grounds:

A. The Circuit Court of Appeals has wrongly decided an important question concerning deviation in a way which is in conflict with the decisions of this court in *The Walldomino* (1927), 272 U. S. 718; *St. Johns N. F. Shipping Corp.* v. *Companhia Geral Commercial do Rio De Janeiro*, 1923, 263 U. S. 119, 124.

It is also in direct conflict with the principles announced by the Circuit Court of Appeals for the Third Circuit in a recent and as yet unreported case, *The Henry W. Cramp* v. *Rosasco*, which is printed as an appendix hereto.

B. The Circuit Court of Appeals has wrongly decided an important question of maritime law concerning proximate cause in a way which is in conflict with the decisions of this court in *The G. R. Booth* (1898), 171 U. S. 450; *U. S.* v. *Hall* (1810), 6 Cranch 171; *The Caledonia* (1894), 157 U. S. 24, and with the decision of The Circuit Court of Appeals for the Third Circuit in *The Henry W. Cramp, supra.*

C. The effect of initial unseaworthiness of the vessel on the special contract of the bill of lading generally and on the prepaid freight clause in particular, is an important question of maritime law which has never been, but should be, settled by this court. For a shipowner certainly should

not be allowed to collect freight and then knowingly send an unseaworthy ship to sea, and retain the freight after the ship is lost or the adventure ended owing to the unseaworthiness.

D. All the questions herein presented are of great commercial importance to shippers, underwriters, shipowners, and all others concerned in sea borne commerce. The decision of the Circuit Court of Appeals on all of these questions appears to be in conflict with the weight of authority and with the fundamental principles of maritime law laid down by this court.

## IV. Accompanying Documents.

A certified copy of the transcript of the record of the proceedings of the District Court and Circuit Court of Appeals is presented herewith.

Wherefore, your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this honorable court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said court to certify and send to this court on a day to be designated for its review and determination, a full and complete transcript of the record and of all proceedings in the said Circuit Court of Appeals had in said cause, entitled in that court "In the Matter of the petition of French Overseas Corporation, owner of the Schooner *Malcolm Baxter, Jr.*, for limitation of liability, French Overseas Corporation and Maryland Casualty Company, appellants, No. 361, Octo-

ber Term, 1926"; that the final order of the Circuit Court of Appeals made and entered in the said case on the 13th day of June, 1927, may be reversed and the decree of the District Court be reinstated, by this honorable court; and that your petitioners may have such other and further relief in the premises as to this honorable court may seem meet and just.

And your petitioners will ever pray, etc.,

REPUBLIC OF FRANCE,
By CHARLES K. CARPENTER,
One of Its Proctors.

COMPAGNIE FRANCO-INDO-CHINOISE,
By HARRY M. ZUCKERT,
Proctor.

ENGINEERING TIMBER COMPANY, LTD.,
By HARRY M. ZUCKERT,
Proctor.

JOHN M. WOOLSEY,
MARK W. MACLAY,
ROBERT S. ERSKINE,
HARRY M. ZUCKERT,
CHARLES K. CARPENTER,
Of Counsel.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

CHARLES K. CARPENTER, being duly sworn, says that he is one of the counsel for the Republic of France, one of the petitioners herein; that he assisted in the preparation of the foregoing petition; and that the allegations thereof are true as he verily believes.

CHARLES K. CARPENTER.

Sworn to before me this 18th day of August, 1927.

Hamilton A. Long

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

HARRY M. ZUCKERT, being duly sworn, says that he is one of the counsel for the Compagnie Franco Indo-Chinoise and the Engineering Timber Company, Ltd., petitioners herein; that he assisted in the preparation of the foregoing petition; and that the allegations thereof are true as he verily believes.

HARRY M. ZUCKERT.

Sworn to before me this 18th day of August, 1927.

Hamilton A. Long

We hereby certify that the foregoing petition in our opinion is well founded and entitled to the favorable consideration of the Court; and that it is not filed for the purpose of delay.

John M. Woolsey,
Mark W. Maclay,
Robert S. Erskine,
Charles K. Carpenter,
Harry M. Zuckert.

New York, August 18th, 1927.

# APPENDIX

IN THE

# UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT.

---

No. 3607 March Term, 1927

---

Schooner *Henry W. Cramp*, Whereof
FRANCIS J. MCDONALD, is Claimant,
Appellant,

*vs.*

ALBERT T. ROSASCO,
Appellee.

---

Appeal from the District Court of the United States for the Eastern District of Pennsylvania

Before BUFFINGTON, WOOLLEY and DAVIS, Circuit Judges.

BUFFINGTON, Circuit Judge.

In the Court below, Albert T. Rosasco, the holder and owner of bills of lading, filed a libel against the schooner *Henry W. Cramp*, to recover damages alleged to have accrued by reason of a breach of a charter party entered into

by the Schooner with the firm of Rosasco Brothers to carry a cargo of pine timber from Pensacola to Genoa, Italy. The libel alleged the schooner had deviated from the charter course and during the period of deviation had abandoned the cargo and thrown it back on the charterer's hands. The vessel was attached and released on a bond and was subsequently lost. The Court below heard the case and decided it on the theory, not on the deviation charged in the libel, but on the ground of a rescission, and made an award on the basis of a return of the freight and insurance premiums which had been paid by the charterers in advance. The defendant took this appeal and contends that it was not responsible and the libel should be dismissed. On the other hand the libellant contends that the true basis of decision should be that the schooner had wrongfully deviated from her chartered route. We here note that even if the contention of the libellant is correct, that as a practical thing, a decree cannot be enforced in excess of the bond and therefore, although libellant's damages might exceed the award made by the Court below, he will be given all practical possible relief by the affirmance of the decree below. Being of opinion that the contention of the libellant as to deviation is well based, we now state our grounds for so holding.

On November 1, 1916, the schooner *Henry W. Cramp* was chartered by its owners to Rosasco Brothers, a firm composed of William S. Rosasco and Albert T. Rosasco, who is the libellant in this case. The charter was for carriage of a cargo of lumber from Pensacola, Florida, to Genoa, Italy, and stipulated: "for a voyage from a safe port in the U. S. Gulf to a safe port on the West Coast of the

United Kingdom including London." Pursuant to charter the schooner arrived at Pensacola and in April or May, 1917, loaded and started on her voyage, before which she was paid in advance freight of $46,995.84, and insurance premiums of $31,842.81. Before sailing the schooner duly issued five bills of lading for the cargo of pitch pine, which bills were subsequently endorsed and negotiated by Rosasco Brothers to the Credito Italiano, a bank at Genoa, and from it bought by Albert T. Rosasco, the present libellant, who resides in Genoa.

The schooner sailed from Pensacola, the last of May but went to Norfolk, Virginia, where she landed June 27th, but the charterer did not know of her whereabouts until September, when in answer to their inquiry, they learned of it from A. D. Cummins & Company, of Philadelphia, Managing Owners of the Schooner, who as justification stated, first, that "It was found impossible at Pensacola to secure a crew to go through the war zone and we therefore had to have the vessel proceed to Norfolk to secure a crew"; second, "We are also engaged in securing war insurance on the vessel", and, third, that the captain was notified by the Collector of the Port "that the vessel could not sail on her voyage by reason of a recent ruling and regulation of the United States Shipping Board". In its reply and its several communications the charterers averred that, "This vessel cleared for Genoa, from this port, fully equipped, manned and provisioned, and there was no necessity nor right, on vessel's part, to deviate to Norfolk (Hampton Roads). If she had not gone there, there never would have been any question of a permit." During the entire after-events the charterers stood on their rights under the char-

ter party, demanded the Schooner complete her voyage and protested against her discharging her cargo.

The vessel remained at Norfolk until October 1, 1917, when she was towed to Philadelphia. Thereafter, and against the protest of the charterer, the cargo was discharged and by stipulation, without waiver of rights, was sold and at a rate that involved a heavy loss as compared with the prices in Genoa. Thereupon Albert T. Rosasco, as owner of the bills of lading, brought this libel claiming to recover as damages $154,750. On hearing, the Court below entered a decree in libellant's favor from which it took this appeal.

As we view the case two questions are involved. First, the defendant contends Albert T. Rosasco has no right of action, because he has not shown title to the bills of lading. Without discussing the proofs in detail, we may say we find this contention without merit. In accordance with their previous, long continued course of business, the firm of Rosasco Brothers, which did business at Pensacola, endorsed these bills of lading and delivered them to the Credito Italiano, a bank at Genoa, which paid them full value therefor. Subsequently, the bank endorsed and sold same to Albert T. Rosasco, who thereupon became the owner of the cargo and who under the business practice of the parties, disposed of such cargoes in Italy as he saw fit. On the non-delivery of the cargo, the latter sent his bills of lading to this country for the purpose of bringing suit and they were produced and are in evidence in this case. The evidence of William S. Rosasco, the other member of the firm, is that Albert T. Rosasco is holder and indeed the sole

owner. Under such facts the right of the latter to bring this libel is clear.

The second question involved is: Was the going of the schooner into Norfolk, Virginia, an unwarranted deviation from a charter party to proceed from Pensacola, Florida, to Genoa, Italy. In accepting the cargo at Pensacola and beginning her journey from that port in accordance with the charter, the schooner undertook that she was seaworthy (which of course included a competent crew) and that she could commence and carry out the charter voyage with reasonable diligence and without unnecessary deviation. Now, that the most direct path from Pensacola to Genoa is not by way of Norfolk and Philadelphia goes without saying, so that going to Norfolk as the schooner did the burden is upon her to show warrant therefor. This she seeks to do by proving what the customary course of sailing vessels was, namely, taking advantage of the Gulf Stream and coming up in it as far as the lattitude of Cape Henry and then turning East to Europe. From this it is contended that the distance from there to Norfolk was so small as not to constitute a deviation. With this contention we cannot agree for the adjudged cases are otherwise. In *Morrison* v. *Shaw*, 2 K. B. 783, where the voyage was from New Zealand to London, it was held a deviation to stop at Havre enroute, though this only amounted to an extra fifty-four miles on a voyage of several thousand miles. In *Ardan* v. *Theband*, 35 Fed. Rep. 620, a side trip of forty miles was held a deviation. In *Thatcher* v. *McCulloh*, 23 Fed. Cases, 891, where the route was New Orleans to New York via Havana, a going to Key West was held a deviation "though it might conduce to expedite the voyage". How firm the law is in

holding vessels to their route will be seen in *Elliott* v. *Wilson*, 4 Brown's O. Cases 470, where the House of Lords held going six miles out of the course specified was a deviation. The going into Norfolk being a deviation we find no proof of anything that justified it. Without discussing the grounds alleged and now set up, it is clear from the testimony that the stop at Norfolk was determined on, not while the vessel was at sea, or for anything there occurring, but before she left Pensacola. In that regard Cummins, one of the managers of the schooner, testified:

> "Q. Had you known when the ship left Pensacola that you could not get sailors for the ship to take her to Genoa?
>
> A. They were having all kinds of trouble to get them.
>
> Q. And you knew when the ship left Pensacola, didn't you, that you would have to go to Norfolk to complete your crew?
>
> A. We had a complete crew.
>
> Q. Well, to replace your crew?
>
> A. No.
>
> • • • • • •
>
> A. Just previous to the vessel sailing I was advised by the master that it was impossible to secure a crew to go to Genoa.
>
> Q. From Pensacola?
>
> A. Yes. I told him if he couldn't get a crew to go to Genoa to ship a crew as far as Norfolk and we would see what we could do there.
>
> Q. And that is what he did?
>
> A. He shipped them for Genoa. We have the articles from the United States Commissioner.
>
> Q. But he did come to Norfolk?
>
> A. Yes.

Q. And this letter of September 4th correctly states your understanding of the matter?

A. And I always thought up until lately that he had shipped the crew for Norfolk.

Q. You had intended then from the start, so far as you were concerned, to go into Norfolk?

A. Not to hold the vessel at Pensacola; to get her out of the Gulf on her way.

Q. And to go up to Norfolk?

A. On her way, yes, sir.

Q. That is to Norfolk?

A. Yes."

It is unfortunate for the Schooner that the master is dead, by reason of there being no proof by him, and that no one on board the vessel could be found, in spite of search, to prove any of the acts necessitating the vessel seeking harbor at Norfolk, but the failure of the vessel to give any notice of her going to Norfolk and remaining there more than two months without informing the charterers, and doing so then only on inquiry by the charterers, is a course of unexplained conduct not calculated to inspire confidence in the alleged purpose of the vessel to complete this contract of affreightment, the risks and expense of which had, by the entry of the United States into war, been largely increased from the time it was made. Seeing then the schooner unwarrantably deviated from her course, it necessarily follows that her coming within the Governmental embargo was solely a sequence of her deviation and if, as we assume for present purposes, such restraint prevented her from making the voyage, it was a barrier which she herself wrongfully raised and which therefore she cannot set up as an excuse for non-compliance with her charter obligation. We here note that the trial Judge reached the

same conclusion and was of opinion that the charterers then had a right to stand on their contract rights and claim damages but that they elected not to do so. In that regard he said:

> "Let us interrupt the recital of events by taking a survey of the situation of the parties at this time in order to get an appraisal of their respective rights. Assuming the going into the harbor of Norfolk was a deviation from the proper course of the charter party voyage, this was a breach of the contract by vessel and gave to the other party the clear right to declare the breach and claim damages for the broken contract. The libellants had the further and equally clear right however to waive the default, refuse to accept a breach and to insist upon performance of the contract. They elected to pursue this latter course. It becomes then of no importance to inquire whether there was a deviation or not."

But in our judgment this conclusion was not justified by the proofs. In the first place the charterers were kept in ignorance of the deviation until September following and remained under the justified impression the vessel was on her way to Genoa. As soon as they learned of the true situation and through the months following they stood on the rights accruing to them by reason of the deviation. Finding the vessel had deviated they did what they could to help the schooner extricate herself from the plight she had brought on herself, and we find clear proof of their consistently and unequivocally standing on the rights created by the deviation and no evidence of their abandoning or waiving such rights. Without reciting all the letters and telegrams evidencing their consistently standing on the rights accruing by reason of the deviation we select as illus-

trative of their position their telegrams of September 12th which states, "Replying to your letter fourth, without prejudice to our rights or those of holders of bills of lading we will aid get permit provided vessel goes forward. We cannot consent to discharge of cargo, but must insist on performance." "September 18th. When you agree for ship that our co-operation shall be without prejudice to any rights we or holders of bills of lading have against ship. Can we co-operate. We are advised ship had no right to go to Norfolk." "September 14th. We shall expect vessel to prosecute and complete voyage, in fulfillment of C/P and B L and under no consideration can we consent to discharge of cargo anywhere except in Genoa, Italy". "September 24th. We do not want any litigation, as you may recollect, and are desirious that the ship sail, but we do not propose, if any rights have accrued to us by vessel's going to Norfolk (Hampton Roads) instead of Genoa, to waive such rights. This vessel cleared for Genoa, from this port, fully equipped, manned and provisioned, and there was no necessity nor right, on vessel's part, to deviate to Norfolk (Hampton Roads). If she had not gone there, there never would have been any question of a permit; however, as before stated, we shall be only too glad, without prejudice, to co-operate in getting the permit. If our co-operation, on these conditions, is satisfactory, please wire us."

In October the schooner was moved to Philadelphia and what followed is testified to by William T. Rosasco and is not contradicted:

"Q. Did the vessel remain in Norfolk or what did she do? Did she proceed from Norfolk to Genoa?

A. No, sir.

Q. Where did she go?

A. She came to Philadelphia.

Q. Did you have anything to do with her coming to Philadelphia?

A. Not a thing.

Q. Did you have anything to do with her going to Norfolk?

A. Not a thing.

Q. When she came to Philadelphia did she proceed from Philadelphia with this cargo to Genoa?

A. No, sir.

Q. What did she do with it?

A. She unloaded the cargo on lighters.

Q. With your approval or permission?

A. With our protest.

Q. Was the lumber ever forwarded to Genoa?

A. No, sir.

Q. Was it abandoned here?

A. Fully abandoned, practically abandoned, according to their own letters. They had nothing to do with it. That is their own statement, the agent of the ship.

Q. And what did become of it finally?

A. It was finally sold.

Q. Under what circumstances?

A. Without prejudice to the shippers nor the holders of the bills of lading as a necessity."

The letters and wires show that the charterers protested and stated that if the schooner persisted in discharging "We will have no alternative but to hold the schooner and or owners liable for any damages we may suffer", while the purpose of the schooner to abandon was evidenced by the managing owner's notice to Rosasco Brothers, viz.:

"This is to advise you that the cargo of lumber, also the rosin, is now on lighters in the port of Philadelphia, and we wish to put ourselves on record to

this effect. We do not own the cargo, have no interest in same whatever, and therefore have no insurable interest, so should there by any loss by fire or marine risk, we will have nothing whatever to do with it or accept any responsibility."

It will thus be seen that the charterers did not accept a return of the cargo but against protest took it because of its discharge and abandonment by the schooner. Under such circumstances they were justified in disposing of it in diminution of damages. And that such was the logic of the situation seems to have been recognized by all parties, who agreed that sale should be made without prejudice, as will appear by the further testimony of William T. Rosasco:

"Q. I understand you were asked about the sale of this lumber to Felin & Company. Under what circumstances and why did you make that sale?

A. Well, there was a necessity of selling it. In a few words it was the necessity of selling it.

Q. Well, did you accept the lumber here?

A. Not at all.

Q. What was done with it?

A. It was loaded by the ship owner.

Q. What did the ship owner do with it?

A. The ship discharged it on lighters and notified us they would have nothing more to do with it, abandoned the cargo.

Q. And after they had notified you they would have nothing more to do with it, then what did you do?

A. Well, then we decided to proceed and see if we could sell it.

Q. Did you have any interviews with anybody on that subject?

A. Only with you in your office.

Q. And who was present at an interview on that subject?

A. Oh, before the cargo was sold we had a conference with the ship owner and Mr. Cummins and Mr. Long to lay the matter before them, at your office.

Q. Who were there?

A. Mr. Long and Mr. Cummins and Mr. MacDonald, the ship owner, and Mr. Yocum.

Q. And at that conference was the sale of this lumber discussed?

A. Fully discussed and the best offers exhibited to the meeting there.

Q. Was there any arrangement entered into then about this sale or how it should be sold?

A. Well, the arrangement was that it should be without prejudice to the interests or rights of the shippers or the holders of the bills of lading.

Q. And after that conference this lumber was sold?

A. Yes, some days afterward. I don't remember exactly the date."

Seeing then that the schooner wrongfully and purposely deviated from her course and as a result thereof became unable to and did not complete her voyage and that the charterers stood upon, protested and have never waived or surrendered their rights, we think libellant was entitled to have damages assessed on the basis of what the charterers' situation would have been had the charter been carried out and the cargo delivered at Genoa. In that case the charterers would have been at the expense of the freight charges and insurance and, having already paid these charges, they would be entitled to receive their cargo at Genoa. For these reasons we affirm in amount, as of the date of the going down of the mandate of this Court, the decree below.

# BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

SUPREME COURT OF THE UNITED STATES.

---

REPUBLIC OF FRANCE, COMPAGNIE FRANCO-INDO-CHINOISE and ENGINEERING TIMBER COMPANY, LTD.,
Petitioners,
(Claimants-Appellees below),
*against*
FRENCH OVERSEAS CORPORATION, as owner of the schooner *Malcolm Baxter, Jr.*,
Respondent,
(Petitioner-Appellant below).

---

IN THE MATTER
*of*
The Petition of the FRENCH OVERSEAS CORPORATION, as owner of the schooner *Malcolm Baxter, Jr.*, for limitation of liability.

---

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The facts are summarized in the petition.

## FIRST POINT

THE DECISION OF THE CIRCUIT COURT OF APPEALS HEREIN IS CONTRARY TO THE WEIGHT OF AUTHORITY, INCLUDING THE DECISIONS OF THIS COURT, IN RESPECT TO THE EFFECT OF A BREACH OF WARRANTY OF SEAWORTHINESS ON THE SPECIAL CONTRACT OF THE BILL OF LADING.

The Circuit Court of Appeals ignored the inescapable consequences of the breach of the warranty of seaworthiness of the *Malcolm Baxter, Jr.*, by her owner.

The owner's warranty of seaworthiness, and his obligation to furnish a vessel ready and *able* to perform the voyage, is absolute and is of the very essence of every contract of affreightment. *The Tornado*, 1883, 108 U. S. 342, 349; *The Edwin I. Morrison*, 1894, 153 U. S. 199, 210.

No obligation is viewed more rigidly by the law than this obligation to furnish a vessel which is seaworthy *and capable of performing the voyage.*

An inexcusable breach of that obligation must result in the shipowner's fullest responsibility, for he has broken the most essential term of his contract.

In the case at bar, the Circuit Court of Appeals affirmed the finding that the shipowner was guilty of an inexcusable breach of the warranty of seaworthiness. Yet that Court has not only permitted the shipowner to escape responsibility for the greater part of the damages sustained by the cargo, but has permitted the shipowner to retain over $100,000 of freight which was prepaid in consideration of

the warranty of seaworthiness, and which the shipowner never actually earned.

Under American law, freight is not earned until the vessel makes delivery at destination. If the freight has been prepaid, it must be returned by the shipowner, in the event of failure to make delivery, *unless* the parties have consented to a special provision in the bill of lading that prepaid freight shall not be returnable in any event. *Caze* v. *Baltimore Ins. Co.* (1813), 7 Cranch 358; *National Steam Nav. Co.* v. *International Paper Co.* (1917 C. C. A. 2nd Circ.), 241 Fed. 861; *Burn Line, Ltd.* v. *U. S. & A. Steamship Co.* (1908, C. C. A. 2nd Circ.), 162 Fed. 298.

A shipowner's only right to a retention of prepaid freight must depend upon a special provision in the contract of affreightment; and it is obvious that a cargo owner, when consenting to such a special provision in the contract of affreightment, does so in reliance upon the shipowner's warranty of seaworthiness of the vessel, which is so rigidly enforced by maritime law, as correctly stated by the District Court (R. *fol.* 934).

The shipowner's warranty of seaworthiness is of the very essence of the contract of affreightment.

Indeed, it seems to be settled law in England that where a vessel is unseaworthy all clauses limiting the full liability of the shipowner for the consequences of such unseaworthiness go by the board. *Atlantic Shipping & Trading Co.* v. *Louis Dreyfus & Co.* [1922] 2 A. C. 250, 257, 260, 261; *Tattersall* v. *National S. S. Co.* (1884), 12 Q. B. D. 297; *Baxter's Leather Co.* v. *Royal Mail Steam Packet Co.* [1908] 2 K. B. 626, 632; *Wiener & Co.* v. *Wilsons, etc. Line* (1910), 15 Com. Cas. 294.

As Lord Sumner said in *Atlantic Shipping & Trading Co.* v. *Louis Dreyfus & Co.* [1922] 2 A. C. 250, at page 260:

> "The shipowners' general liability in respect of damage due to the ship's unseaworthiness, accordingly, remains where the law places it. Underlying the whole contract of affreightment there is an implied condition upon the operation of the usual exceptions from liability—namely, that the shipowners shall have provided a seaworthy ship. If they have, the exceptions apply and relieve them; if they have not, and damage results in consequence of the unseaworthiness, the exceptions are construed as not being applicable for the shipowners' protection in such a case.
>
> This principle of construction has not been confined to excepted causes of loss; it has been extended to provisions which limit the amount to be paid in satisfaction of the loss, for these equally, though in another way, limit *pro tanto* the shipowners' liability. There is no difference in principle between words which save them from having to pay at all and words which save them from paying as much as they would otherwise have had to pay."

It seems to be perfectly clear that a provision for the retention of prepaid freight should be dealt with on the same basis as any other limitation of liability in favor of the shipowner.

If, therefore, a shipowner is guilty at the outset of an inexcusable breach of his warranty of seaworthiness, and has broken one of the most essential obligations placed upon him by the contract, it is, on the face of it, unjust to permit him to enforce against the cargo a *special*

*provision of the contract* for the retention of the prepaid freight,—the freight never having been actually earned by carriage of the cargo.

In *Allanwilde Transport Corp.* v. *Vacuum Oil Co.*, 1919, 248 U. S. 377, this Court at page 386, expressly pointed out that the shipowner had fulfilled all of his obligations; that there was no imputation of bad faith on his part; and that the inability to perform the voyage was in no way traceable to any failure of the shipowner.

The inference is that, if the shipowner had failed to furnish a seaworthy vessel, capable of performing the voyage, this court, in the case cited above, would not have permitted him to assert in his own favor the special terms in the contract of affreightment, for the retention of prepaid freight which the vessel had not, in fact, earned.

## SECOND POINT

THE CIRCUIT COURT OF APPEALS ERRONEOUSLY HELD THAT THE ADVENTURE WAS FRUSTRATED BY THE GOVERNMENTAL EMBARGO.

The Circuit Court of Appeals apparently was of the opinion that the Governmental embargo of September 28th, 1917, did not actually become effective as to the *Malcolm Baxter, Jr.*, until she had made her repairs, and was ready to sail from Havana on January 14th, 1918 (R. pp. 1170-1).

In that view of the case, the Circuit Court of Appeals considered that, when the schooner *became* ready and able to continue the voyage *from Havana* on January 14th, 1918,

she was prevented from doing so by the Governmental embargo, which had rendered the voyage illegal (R. p. 1170).

Your petitioners respectfully submit that the Circuit Court of Appeals committed serious error in that interpretation of the law applicable to a defense of "frustration".

This defense is equitable in nature, as Judge Hough pointed out in *Texas Company* v. *Hogarth*, 1919, 265 Fed. 375, p. 378; affirmed, C. C. A. 2nd Circ. 1920, 267 Fed. 1023; 1921, 256 U. S. 619.

An essential requirement is that the party invoking the defense shall come before the court with clean hands, and show that he was in all respects ready, *able*, and willing to perform his contract at the time of the alleged frustration.

This court in *Texas Co.* v. *Hogarth*, 1921, 256 U. S. 619, pointed out on page 629, that the doctrine of frustration comes into effect,

> "if, before the time for performance and without the default of either party, the particular thing ceases to exist, or be available for the purpose."

To the same effect is *The Isle of Mull*, C. C. A. 4th Circ., 1921, 278 Fed. 131, 134.

If, as this Court said in *The Texas Co.* v. *Hogarth*, *supra*, the alleged frustration must come into effect "before the time for the performance," the Circuit Court of Appeals in this case erred in considering the question as though the time for the performance did not commence until the *Malcolm Baxter, Jr.*, finished her repairs at Havana, on January 14th, 1918.

The cargo owners did not contract for a voyage from Havana beginning January 14th, 1918. They contracted for the voyage commencing at New Orleans, in August, 1917.

Insofar as the Governmental embargo became of any effect, that effect must be considered as of the date of the embargo, September 28th, 1917. As the District Court found, *at no time prior to September 28th, 1917, was the Malcolm Baxter, Jr., able and ready to perform the contracted voyage* (R. fols. 933-4).

The decision of the Circuit Court of Appeals, in effect, is to permit the shipowner to escape liability on the ground that the embargo of September 28th impaired or destroyed the shipowner's INABILITY to perform.

Obviously, if the vessel had been ready and able to perform when she lawfully cleared from New Orleans, on August 16th, 1917, she would not have put into either Key West or Havana. She would have been well across the Atlantic by September 28th, and never would have been affected by the embargo of that date.

The Circuit Court of Appeals has erred in its failure to recognize that everything which occurred up to the redelivery of the cargo at New York was the direct result of the shipowner's inexcusable breach of the most essential term of the contracts of carriage; and has erred in permitting the shipowner to escape, in greater part, the consequences of his wrong.

The Circuit Court of Appeals, in holding that the Governmental embargo of September 28th, 1917, was the effective cause of the frustration of the voyage, and that the shipowner is not liable for the damages resulting from that frustration, lost sight of the fact that the shipowner's breach of warranty of seaworthiness was the proximate continuing cause of all of the damages sustained by the cargo, as the District Judge held (R. fols. 935, 936).

Although, as the Circuit Court of Appeals held, the embargo was not the *result* of the unseaworthiness, the *effect* of the embargo was due solely to the vessel's breach of warranty. The embargo "was a barrier which she herself wrongfully raised and which therefore she cannot set up as an excuse for non-compliance with" her obligation. *The Henry W. Cramp*, Appendix to Petition, *supra*, p. 27.

## THIRD POINT

THE CIRCUIT COURT OF APPEALS ERRONEOUSLY HELD THAT THE SCHOONER *Malcolm Baxter, Jr.*, WAS NOT GUILTY OF A DEVIATION.

The law as to deviation is important in this case, because if the schooner *Malcolm Baxter, Jr.*, and her owner were guilty of a deviation, the contracts of carriage were then vitiated, and the schooner and her owner became insurers as to all subsequent losses by the cargo. *The Sarnia*, C. C. A., 2nd C., 1921, 278 Fed. 459, 463; *Lawrence* v. *Minturn*, 17 How. 111; *Mobile etc. R. R. Co.* v. *Jurey*, 111 U. S. 584; *Gibaud* v. *Great Eastern Ry. Co.* [1921] 2 K. B. 426, 431, 435; *Thorley* v. *Orchis S. S. Co.* [1907] 1 K. B. 660.

The ship and her owner, being then unable to rely on any clauses in the bills of lading, would be responsible to the cargo for all of the damages for failure to deliver at destination, including the return of the prepaid freight, as the District Court held (R. fol. 936).

The decision of the Circuit Court of Appeals is directly contrary to decisions of this court. *The Willdomino* (1927), 272 U. S. 718; *St. Johns N. F. Shipping Corp.* v. *Companhia Geral Commercial do Rio De Janeiro* (1923), 263 U. S. 119, and is probably contrary to the principles of the English decisions.

It is in direct conflict with the principles announced by the Circuit Court of Appeals for the Third Circuit in a recent and as yet unreported case, *The Henry W. Cramp* v. *Rosasco*, which is printed and annexed as an appendix to the Petition herein.

Your petitioners submit that the decision of the Circuit Court of Appeals that the *Malcolm Baxter, Jr.*, and her owner were not guilty of deviation in this case is contrary to the rule of law announced by this court in the case of *The Willdomino* (1927), 272 U. S. 718, 727.

In that case, this court expressly stated that;

> "an emergency sufficient to excuse a departure cannot arise out of * * * gross negligence."

In the case at bar, all the difficulties which arose after the vessel broke ground at New Orleans, and which interrupted the completion of the contract voyage, were the direct result of the shipowner's negligence in failing to

make any attempt to discover and remedy the vessel's defective condition, which, as both courts held, was discoverable.

The shipowner, as the undisputed evidence shows, merely shut his eyes to the condition of the vessel, and did not make the slightest effort to ascertain her condition.

It is submitted such conduct falls squarely within the term "gross negligence", as used by this court in *The Willdomino* case, *supra*.

In *The Willdomino* case, the unseaworthiness of the vessel consisted in an insufficient supply of fuel. In the case at bar, the unseaworthiness of the vessel consisted in structural defects and weaknesses, which existed before the voyage commenced, which could have been discovered, if anyone had looked for them, and which were not discovered solely because the shipowner made no examination of the vessel, and shut his eyes to her condition.

The Circuit Court of Appeals has asserted that there is a distinction between these two cases, insofar as the rule of deviation is concerned (R. p. 1170).

Your petitioners respectfully submit that the distinction asserted by the Circuit Court of Appeals is unsound.

There cannot be any difference in fact or in law between a case where a shipowner permits his vessel to leave port, incapable of performing a voyage because of insufficient fuel, and a case where the shipowner permits his vessel to leave port incapable of performing the voyage because of structural defects, which were discoverable by the exercise of due diligence.

In *both* cases, the subsequent departure from the voyage, either to replenish the insufficient fuel supply or to remedy the vessel's defective condition, *is the direct result of the owner's gross negligence.*

Furthermore, in considering the application of the rule of deviation to the case at bar, the Circuit Court of Appeals erroneously considered deviation as being merely a physical departure from the course of the contract voyage. The Circuit Court of Appeals lost sight of the fact that a "deviation" is an unjustifiable failure of a shipowner to perform the contracted voyage, and may arise not only from a physical departure from the course of a voyage, but also from other causes, such as unreasonable delay, *or from the failure of a shipowner to furnish a vessel capable of performing and ready to perform the voyage. The St. Paul* (1921), 277 Fed. 99, 107; *The Citta di Messina* (1909), 169 Fed. 472.

Thus, as this Court has held in *St. Johns N. F. Shipping Corporation, Owner, etc.* v. *S. A. Companhia Geral Commercial do Rio de Janeiro* (1923), 263 U. S. 119, exceptions clauses in bills of lading are set aside when cargo is shipped under a clean bill of lading on deck and is jettisoned during a storm, for the reason that a clean bill of lading amounts to a positive representation by the ship that the goods are under deck and will be so carried. After giving such a bill of lading, their stowage on deck constitutes a deviation from the contract of carriage.

Mr. Justice McReynolds, in that case said, at page 124:

> "By stowing the goods on deck the vessel broke her contract, exposed them to greater risk than had

been agreed and thereby directly caused the loss. She accordingly became liable as for a deviation, cannot escape by reason of the relieving clauses inserted in the bill of lading for her benefit, and must account for the value at destination."

In the case at bar, the deviation consisted not only in the vessel's putting into Key West and Havana, but primarily in that, when she loaded her cargo and broke ground for the voyage, she was actually incapable of performing it.

Moreover, the Circuit Court of Appeals, in considering the question of deviation, erred in its conclusion that a physical departure from the course of the voyage would not constitute a deviation, unless it was *intended* when the voyage commenced.

Intent at the commencement of the voyage is not an essential element of deviation.

It seems clear, from the language of this court in the case of *The Willdomino*, that there may be a deviation, as a result of the owner's gross negligence, entirely without the existence of any actual intent at the commencement of the voyage.

## LAST POINT

THE PRAYER OF THE PETITIONERS SHOULD BE GRANTED.

Your petitioners respectfully submit that the final determination by this Court of the questions of law involved in this case is of the utmost importance to the rights

of owners of vessels and cargoes engaged in waterborne commerce.

The decision of the Circuit Court of Appeals herein is not only contrary to the law, as announced by this Court in its earlier decisions, but is contrary to the sound principles of the established maritime law of this country.

Unless the errors in that decision be corrected by this Court, the effect will be to create regrettable confusion regarding questions of law which are of the utmost importance in every contract of affreightment.

JOHN M. WOOLSEY,
MARK W. MACLAY,
ROBERT S. ERSKINE,
HARRY M. ZUCKERT,
CHARLES K. CARPENTER,
Of Counsel.

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1927.

No. 459.

REPUBLIC OF FRANCE, COMPAGNIE FRANCO-INDO-CHINOISE, and ENGINEERING TIMBER COMPANY, LTD.,

Petitioners,

*against*

FRENCH OVERSEAS CORPORATION, as Owner of the Schooner *Malcolm Baxter, Jr.*,

Respondent.

---

IN THE MATTER

*of*

The Petition of FRENCH OVERSEAS CORPORATION, as owner of the Schooner *Malcolm Baxter, Jr.*, for Limitation of Liability.

## REPLY BRIEF FOR PETITIONERS.

I. The respondent's argument is built around the following statement, which appears on page 1 of its brief:

> "Indeed, the entire petition and supporting brief are based on the misapprehension that the respond-

> ent relies on a contract provision or exception of 'restraint of princes' or otherwise, whereas the defense actually is that when the embargo was declared further performance became illegal."

That statement is wholly incorrect.

It is not warranted by anything expressed or implied in the petition herein.

The existence or non-existence of a contract provision or exception of "restraint of princes" has nothing whatsoever to do with the questions of law which the petitioners are raising before this Court.

In those portions of the petition and brief in support thereof which are quoted at pages 24-26 of the respondent's brief, the use of the phrase "special contract" has no reference to any "restraint of princes" clause, but refers to the special prepaid freight clause, under which the respondent is seeking to retain unearned freight, in spite of its own flagrant breach of the contracts of carriage.

II. The respondent's brief, in its lengthy argument that its defense is based on a theory of "illegality", ignores the real questions of law which the petitioners are raising.

It makes no difference whether the effect of the Governmental embargo is referred to as "illegality", "impossibility", or "restraint of princes". The nature of the defense put forward by the respondent under the embargo—*i. e.*, frustration—cannot be obscured by the word used to describe it.

The real question here is not the terminology of the respondent's defense under the embargo, but is *whether that defense is available to the respondent at all.*

The petitioners are asking whether a shipowner may put forward a Governmental embargo as a defense to the nonperformance of a voyage, *on any theory*, when the shipowner's own flagrant breach of contract was the direct and immediate cause of the vessel being "caught" by the embargo.

Or, to put it in another way, can a shipowner urge, *on any theory*, a Governmental embargo as a defense, whether described as an "illegality", "impossibility", or otherwise, when the vessel, by reason of the owner's flagrant breach of contract, was not ready and able to perform the contracted voyage at any time previously to the levying of the embargo?

May a shipowner, *on any theory*, contend, as a proposition of law, that a Governmental embargo excuses him from the nonperformance of a contracted voyage, on the ground that the embargo made permanent the already existing INABILITY of performance on his part, due to his own earlier and flagrant breach of contract?

If, as the respondent contends, he is thus excused, there is certainly no authority in this court for any such proposition, and it is important that this Court should render a decision on this question *which is of great importance in maritime law*.

III. The statements at pages 7, 17, 22 and 23 of respondent's brief, that the case involves solely questions of fact, and that the petitioners are seeking a review of the testimony, are unwarranted.

The facts are fully settled in the petitioners' favor by the decisions of the lower courts.

The only questions as to which the lower courts were not in accord are *questions of law*, as to how far, if at all, the respondent herein can escape liability for the results of the schooner's *failure to carry the cargo to destination*.

It is solely as to those questions of law that the petitioners are now asking this Court to review the case.

IV. It is obvious, from the undisputed facts in the testimony, that, if the respondent had performed its contract, and if the *Malcolm Baxter, Jr.*, had been ready and able to perform the voyage, she would have been well on her way across the Atlantic, long before the embargo of September 28th, 1917, and would never have been "caught" by the embargo.

While it may be perfectly true that ultimately she could not proceed from Havana because of the embargo, just as the *Henry W. Cramp* could not proceed from Norfolk (*Cf. The Henry W. Cramp*, decision printed as appendix to the petition herein), nevertheless, in this case, as in the case of *The Henry W. Cramp*, the schooner would never have been affected by the embargo, nor come under the embargo's restraint, if it had not been for the respondent's flagrant breach of contract, which necessitated the schooner putting into the port of Havana for repairs.

Therefore, when one considers the question of the damages to the petitioners which flow from the respondent's initial breach of the contract, it is obviously a question of law as to how far all of the damages sustained by the petitioners' by reason of failure to deliver the cargo at destination, may be said to have been the direct and proximate result of the respondent's breach of warranty of seaworthiness.

V. The respondent's brief in opposition, at page 17, contains the assertion that there is not a scintilla of evidence to controvert the proposition that the schooner was rendered seaworthy by the repairs made at Havana.

The petitioners submit that this is immaterial, because the contract was not for a voyage from Havana in January, 1918, but a voyage from New Orleans, in August, 1917.

But it should be noted that the schooner's log shows that, shortly after leaving Havana, she was leaking to a substantial extent (*R. fols.* 684, 685), and although her master testified that, on arrival at New York, she was substantially in the same condition as when she left Havana (*R. fol.* 376), her log shows that, on arrival at New York, while anchored in the quiet waters of the Harbor, she was leaking to the astonishing extent of 26 inches of water an hour, or 52 feet in every 24 hours! (*R. fol.* 690). Moreover, the District Court expressly found that,

> "The repairs lavished upon her first at Hoboken and then at Havana did not serve materially to strengthen and improve her condition" (*R. fol.* 920).

The Circuit Court of Appeals in its opinion did not disturb that finding of fact.

VI. The statement at page 38 of respondent's brief in opposition, that the case of *The Henry W. Cramp* was decided before the filing of briefs or argument in the Circuit Court of Appeals in the case at bar, is an error. The case at bar was argued in May, 1927, and the decision was filed on June 6th, 1927, whereas the decision in the *Henry W. Cramp* case was not filed until June 13, 1927.

It is sufficiently obvious, therefore, why the decision in the case of the *Henry W. Cramp* was not referred to on the argument of the appeal in the case at bar.

VII. The respondent, at page 38 of its brief in opposition, argues a distinction between the case at bar and the case of *The Henry W. Cramp* on the ground that, here there was no intent on the part of the master of the *Malcolm Baxter, Jr.*, to deviate, whereas there was intent on the part of the master of the *Henry W. Cramp*.

In the case of *The Henry W. Cramp*, the vessel, because of the negligence and unjustifiable omissions of her owner and master, was placed in a situation in which the completion of the voyage was subsequently prevented by the embargo. The Circuit Court of Appeals for the Third Circuit, in that case, for those reasons, declined to allow the vessel and her owner any defense based on the embargo.

In the case at bar, the *Malcolm Baxter, Jr.*, similarly, because of the negligence, breach of warranty, and unjustifiable omissions of her owner and master, was placed in a situation in which the embargo subsequently prevented the completion of the voyage. Yet the Circuit Court of Appeals for the Second Circuit in this case, although finding the negligence, breach of warranty, and omissions as facts, has allowed the vessel and her owner to escape liability for failure to deliver the cargo at destination, and has sustained its defense of the embargo.

These decisions of the two Circuits are directly opposed in principle.

The suggestion of respondent herein that there is a distinction between the two cases, because the negligence and unjustifiable omissions of the owner and master were conscious in one case, and unconscious in the other, is a

subtle refinement which does not appear to be supported by any principles of law.

Whether any such distinction be good or not is a question which should be settled finally by this court, inasmuch as it has a most direct and important bearing on all maritime contracts of affreightment.

VIII. Counsel for your petitioners herein are advised that, in the case of *The Henry W. Cramp*, a petition for certiorari to the Circuit Court of Appeals for the Third Circuit is now before or is about to be presented to this Court, and that counsel for the *Henry W. Cramp* are also contending that the decision of the Circuit Court of Appeals for the Third Circuit in that case is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in the case at bar.

IX. On behalf of the petitioners, it is again submitted that this case, on the established facts, raises important questions of law as to which there has been a disagreement, not only between the lower courts herein, but also between the Circuit Court of Appeals for the Second Circuit in this case, and the Circuit Court of Appeals for the Third Circuit in the case of *The Henry W. Cramp;* and that the petition for certiorari should be granted, in order that these important questions of law may finally be settled by this Court.

Respectfully submitted,

JOHN M. WOOLSEY,
MARK W. MACLAY,
ROBERT S. ERSKINE,
CHARLES K. CARPENTER,
HARRY M. ZUCKERT,
Counsel for Petitioners.

PAGE

The Trial Court inadvertently misstated the facts in the Allanwilde case, 248 U. S. 377 ..... 5

Only a question of fact is involved in this case, and that fact has been found by both courts against the petitioners ..... 7

The petitioners' own evidence shows that the *Malcolm Baxter, Jr.*, would actually have carried this cargo to Bordeaux if the American Consul at Havana in enforcing the Embargo had not physically prevented her ..... 9

The evidence is uncontradicted that the *Malcolm Baxter, Jr.*, was not only perfectly seaworthy at Havana, but would actually have sailed for Bordeaux if not stopped by the Embargo ..... 17

Under the decision of the Circuit Court of Appeals the petitioners are recovering all the physical damage sustained by the cargo, including both seawater and handling damage, together with a refund of general average deposits and together with fall or loss in market value resulting from delay. Their entire cargo was redelivered to them at New York in the same sound condition as when shipped with the exception of a very small part damaged by seawater and a somewhat larger part damaged by handling of stevedores at Havana. The petitioners are asking this Court to award them additional damages which demonstrably resulted only from the act of the American Consul in enforcing the Embargo by preventing the Schooner from sailing from Havana for Bordeaux ..... 19

List of various errors in the statement of facts in the petition for certiorari ..... 24

PAGE

Summary of facts showing that the extent of unseaworthiness of the *Malcolm Baxter, Jr.*, was so slight that she actually carried this cargo more than 2,000 miles without any seawater damage excepting to a very small part of the cargo. The total amount claimed by petitioners for seawater and handling damage, refund of general average deposits and loss or fall in market value totals only "about one-fourth" (petition, p. 13) of the sum that the petitioners are asking in this Court ... 33

There is no conflict between the decision below and any decision of this Court or of the Circuit Court of Appeals of any other Circuit ... 38

The Henry W. Cramp case (C. C. A. 3) is obviously distinguishable because in that case there was a positive, intentional and wholly unexplained act of deviation by the shipowner in ordering the master of the Schooner to put into the port of Norfolk and not to perform the voyage ... 38

The doctrine of Kish *v.* Taylor, 1912 Appeal Cases 604, has long been well established both in this country and in England and has previously been followed by the Circuit Court of Appeals for both the Second and Fourth Circuits ... 39

Conclusion ... 44

## List of Authorities Cited.


| | PAGE |
|---|---|
| Allanwilde Transport Corp. *v.* Vacuum Oil Co., 248 U. S. 377 | 2, 3, 6, 20, 22 |
| Atlantic Shipping Co. v. Louis Dreyfus & Co., [1922] 2 A. C. 250, 257 | 20 |
| Henry W. Cramp, Francis McDonald, Claimant, *v.* Albert T. Rosasco (C. C. A. 3) | 38 |
| International Paper Co. *v.* The Gracie D. Chambers, 248 U. S. 387 | 2, 6, 22 |
| Kish *v.* Taylor, 1912 Appeal Cases 604 (House of Lords) | 27, 39, 42 |
| Kronprinzessin Cecilie, 244 U. S. 12 | 4 |
| Standard Varnish Works *v.* The Bris, 248 U. S. 392 | 2, 22 |
| Turret Crown, 284 Fed. 439 (C. C. A. 4); Cert. Denied 262 U. S. 742 | 27, 41, 43 |
| Turret Crown, 297 Fed. 766 (C. C. A. 2); cert. denied 264 U. S. 591 | 27, 41, 42 |
| Willdomino, 272 U. S. 718 | 28, 43 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1927.

No.....

REPUBLIC OF FRANCE, COMPAGNIE FRANCO-INDO-CHINOISE, and ENGINEERING TIMBER COMPANY, LTD.,

Petitioners,

*against*

FRENCH OVERSEAS CORPORATION, as Owner of the Schooner *Malcolm Baxter, Jr.*,

Respondent.

IN THE MATTER

*of*

The petition of FRENCH OVERSEAS CORPORATION, as Owner of the Schooner *Malcolm Baxter, Jr.*, for Limitation of Liability.

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Errors and omissions in stating the facts in the petition for certiorari have misled counsel for petitioners into stating and arguing questions which are not raised by the record in this case. Indeed, the entire petition and supporting brief are based on the misapprehension that the respondent relies on a contract provision or exception of

"restraint of princes" or otherwise, whereas the defense actually is that when the embargo was declared further performance became illegal. Both courts below have found concurrently that an embargo was declared which made further performance of the contract by the respondent or the petitioners illegal (R. 310-311; R. 1171). The Circuit Court of Appeals said (R. 1171):

> "The embargo was an unusual exercise of power by the Government, a permanent restraint making the sailing of the ship illegal and therefore impossible, and rendering that illegal which had previously been legal. *Allanwilde Corp.* v. *Vacuum Oil Co.*, 248 U. S. 377, *Int. Paper Co.* v. *The Gracie D. Chambers*, 248 U. S. 387, *Standard Varnish Works* v. *The Bris*, 248 U. S. 392.
>
> The contract to carry the cargo to Bordeaux, which after making the repairs the ship was ready to perform, was thus by the embargo rendered illegal and impossible of further performance, entirely independent of any exception or express agreement of the parties."

The trial court also found that the embargo made further performance illegal and impossible. The trial court said (R. 310-311):

> "Before proceeding to take up the question as to whether the unseaworthiness of the 'Baxter', or the embargo placed upon sailing vessels, brought about the abandonment and frustration of the voyage, it is necessary to deal with Claimants' contention that the 'Baxter' made no effort to obtain a clearance from Havana to Bordeaux. It is said that in certain instances sailing vessels were permitted to clear for

points beyond the war zone, and that, inasmuch as a part of the 'Baxter's' cargo was for the French Republic, there is reason to suppose that she too, might have been permitted to go forward, assuming her fitness to do so. There is, however, no proof that exceptions were granted by the Government, or that one would have been granted in this instance.

Captain Creighton was told by the U. S. Consul in Havana that if clearance for Bordeaux were applied for it would be refused. In the absence of any proof other than that now in the record, I shall assume that the embargo was rigidly applied and that the ship would not have been permitted to go on her way."

It is elementary that illegality is an absolute defense entirely irrespective of the presence or absence of any contract provision and this Court, after fully answering the points now made by petitioners, so held in *Allanwilde Transportation Corp.* v. *Vacuum Oil Co.*, 248 U. S. 377. In the *Allanwilde* case, where an embargo order was also involved but where the contract of affreightment did not, as here, contain an exception of restraint of princes, this Court said (248 U. S. 377, 385-386):

"It is urged, however, that there is no provision in the contract (charter party and bill of lading) of the Oil Company excepting 'restraint of princes, rulers and peoples' and that, therefore, the carrier was not relieved from its obligation by the refusal of clearance to sailing vessels. And it is further urged that such embargo was at most but a temporary impediment and the cargo should have been retained until the impediment was removed or trans-

> ported in a vessel not subject to it. We cannot concur in either contention. The duration was of indefinite extent. Necessarily, the embargo would be continued as long as the cause of its imposition—that is, the submarine menace—and that, as far as then could be inferred, would be the duration of the war, of which there could be no estimate or reliable speculation. The condition was, therefore, so far permanent as naturally and justifiably to determine business judgment and action depending upon it. *The Kronprinzessin Cecilie*, 244 U. S. 12."

That case was remarkably like the present. There (284 U. S. 385):

> "The physical events and what they determined are certified. First, there was the storm, compelling the return of the ship to New York to avert greater disaster; then the action of the Government precluding a second departure."

There was no finding that that storm was an unusual one for that voyage, during that season. Similarly in the present case there was the unusually "rough and choppy" sea (R. 244-245) and "mild gale" (R. 244, Chief Mate Clapp, Claimants-Appellants' witness) compelling the *Malcolm Baxter, Jr.* to put into Key West and Havana to avoid greater disaster; then the action of the Government precluding a second departure for Bordeaux.

We emphasize all this to show that this Court, after very full consideration of the entire subject matter involved in this case, has already held in three companion cases (248 U. S. 377; 248 U. S. 387; and 248 U. S. 392) that the ab-

sence of liability of a sailing vessel owner, in a case where his vessel cannot clear because of the Sailing Vessel Embargo, does not depend at all on whether or not the shipowner has used due diligence to make his vessel seaworthy on sailing or is entitled to limit its liability.

The real truth of the matter is, as we pointed out in the Circuit Court of Appeals, that the trial court in the present case, after finding as a fact that the Embargo made further performance of the contract illegal, proceeded to an erroneous result only because of an obvious mistake in stating the facts in the *Allanwilde* case decided by this Court (248 U. S. 377) and in assuming that this Court there held that illegality is not a defense unless there is a contract provision as to restraint of princes or otherwise providing specifically that if the contract afterwards becomes illegal the parties are excused from further performing it. The fact is that there was no "restraint of princes" or similar clause in the contract involved in the *Allanwilde* case, and the very point of this Court's decision in the *Allanwilde* case was that such clause was unnecessary if in fact further performance became illegal. The trial court in the present case states in its opinion that it understood that in the *Allanwilde* case, the shipowner was exonerated—because of the "restraint of princes clause" (R. 311) in the bill of lading, which he was entitled to the benefit of because his ship was seaworthy on sailing and "there was no default over which either ship or its owners had any control" (R. 311). The trial court said:

> "Coming now to the frustration of the adventure and the responsibility therefor, *one is confronted*

> *with the 'restraint of princes' clause* and that relating to prepaid freight as contained in the bills of lading. The comprehensive nature and binding effect of such clauses, upon the intervention of governmental embargo, is illustrated by such cases as *Allanwilde Transport Co.* v. *Vacuum Oil Co.*, 248 U. S. 377, and *International Paper Co.* v. *Gracie D. Chambers*, id. 387. In those cases, however, there was no finding that the vessels concerned were unseaworthy for their contemplated voyages. Each ship fulfilled its warranty of fitness; there was no default over which either ship or its owners had any control; and *as a result of these circumstances and the presence of appropriate exceptions in the bills of lading*, the ships were adjudged to be entitled to retain the freight money. Here, the facts are materially different." (Italics ours.)

It appears from the passage above quoted from the *Allanwilde* decision that the trial court was in error when it assumed that there was a restraint of princes clause involved in the *Allanwilde* case, and that that was the ground on which the shipowner was exonerated. The fact was that this Court exonerated the *Allanwilde* on the general ground of supervening illegality although there was nothing in the contract of affreightment on the subject.

It is interesting to observe the effort of the petitioners to avoid the doctrine laid down by this Court in the *Allanwilde* case. Apparently they have found it necessary in order to sustain their argument to ignore the concurrent finding of both lower courts that the further performance of the voyage became illegal. For instance, on page 3 of the Table of Contents and on page 37 of the Brief in Sup-

port of the Petition counsel for petitioners substitute the word "frustrated" for the word "illegal". They say

> "Second Point—The Circuit Court of Appeals erroneously held that the adventure was frustrated by the Governmental embargo."

They then proceed to rely on cases in which absolutely no question of illegality was involved.

In stating the facts in the petition counsel for the petitioners also omit the most important facts which are shown by the uncontradicted evidence and by the testimony of petitioners' own witnesses, namely, that after the schooner had carried the cargo for six hundred miles of the voyage and had put in for repairs those repairs were completed as fast as possible and that on their completion she was in all respects seaworthy and would actually have sailed from Havana for Bordeaux if the embargo had not prevented her.

Counsel for petitioners are in error in stating that:

> "The Courts below have finally disposed of all questions of fact in favor of the petitioners" (Petition, p. 2).

The decision in the present case turned not on a question of law but on a question of fact and that fact has been determined adversely to the petitioners by both courts below. That fact is that the evidence in this case establishes that the cause which prevented the schooner *Malcolm Baxter, Jr.* from actually proceeding to and delivering this cargo at Bordeaux was the refusal of the American Consul at Havana to give her clearance when her master de-

# SUBJECT INDEX.


| | PAGE |
|---|---|
| The questions stated and argued do not arise on the Record in this case | 1 |
| Errors in statement of facts in petition for certiorari. Defense is based, not on contract exception of "restraint of princes", but on supervening illegality | 2 |
| Omission from petition of the most important fact that the lower courts have found concurrently that the levying of the Embargo made further performance by continuing from Havana to Bordeaux both impossible as matter of fact and illegal as matter of law | 2 |
| Circuit Court of Appeals' finding | 2 |
| Trial Court's finding | 2 |
| Omission from petition of the finding that the uncontradicted evidence shows that the master, on sailing from New Orleans, did not intend to deviate | 42 |
| The Circuit Court of Appeals merely followed this Court's decision in Allanwilde Transportation Co. *v.* Vacuum Oil Co., 248 U. S. 377, the House of Lords' decision in Kish *v.* Taylor, 1912 Appeal Cases 604, and the decisions in The Turret Crown, 284 Fed. 439 (C. C. A. 4), cert. den. 262 U. S. 742; and The Turret Crown, 297 Fed. 766 (C. C. A. 2), cert. den. 264 U. S. 591 | 3 |

manded it. This refusal was based on the embargo order issued by the United States Government against sailing vessels passing through the war zone. We cannot too strongly emphasize the fact that the evidence is uncontradicted that when that clearance was asked for the schooner was seaworthy in all respects to continue to Bordeaux and deliver the cargo. No objection whatever was made by the petitioners to the evidence that the schooner was then seaworthy in all respects. Lloyd's surveyor, Holmes, at Havana, certified on January 9th, 1918:

> "While the Schooner 'Malcolm Baxter, Jr.' was undergoing repairs, and also while loading, I have had her under observation, and can report that the work as recommended in the Surveyor's Report of October 31st, 1917, with one exception, was done in a thorough and satisfactory manner.
>
> The vessel is now quite tight.
>
> The exception mentioned was the unshipping of the rudder; and as this was considered to be unnecessary, the work was not undertaken.
>
> The cargo is stowed in a satisfactory manner, and I hereby certify that in my opinion, on this date, the vessel is in a safe and seaworthy condition to proceed on her voyage" (R. 212-213).

This evidence of surveyor Holmes was received in evidence without objection (R. 173) in consideration of a similar privilege granted the petitioners with reference to another witness and to avoid the formality and expense of taking surveyor Holmes' testimony that the facts recited in his certificate were true (R. 173, 151). Chief Mate Clapp, a witness for petitioners, testified that on completion of the

repairs at Havana, the *Malcolm Baxter* was in every respect in a good, seaworthy condition (R. 252-253). Captain Loveland, also a witness for petitioners, testified that the repairs at Havana were made according to the recommendation of the surveyors and were made as fast as circumstances would allow (R. 267). Captain Creighton, a master of wooden schooners for 32 years (R. 84), also examined the *Malcolm Baxter* at Havana on completion of her repairs and testified that in his opinion she was seaworthy to carry a cargo to Europe (R. 86).

Captain Hupper, a master of wooden schooners for 48 years (R. 115), who assumed command of the *Malcolm Baxter* at Havana, arrived there on December 22, 1917 (R. 116). He examined the *Malcolm Baxter* and testified that she was in a seaworthy condition to make a voyage to Bordeaux (R. 117, 124, 132). Captain Creighton and Captain Hupper applied to the American Consul at Havana for clearance for Bordeaux, the repairs having been completed, and the American Consul refused on the ground that the United States Government had declared an embargo against sailing vessels passing through the submarine zone (R. 88, 100, 101, Captain Creighton; R. 116, Captain Hupper; R. 253, Chief Mate Clapp, a witness for petitioners; R. 44-45, Mr. Sickler; R. 305-6, 310-11, opinion trial court).

The *Malcolm Baxter* not being able, because of the embargo, to clear for Bordeaux, and having waited a reasonable time after completion of repairs for the embargo to lift, sailed from Havana on January 14, 1918, for New York (R. 228).

The petitioners' own evidence is that the *Malcolm Baxter* was stopped at Havana by the American Government.

Claimants' Exhibit 106-A, printed at page 746 of the Record reads in full as follows:

"22 February 1918

FV/CT

Minister of Commerce,
Paris.

We beg to put before you as briefly as possible the details of a demand concerning a lot of goods which we have paid for and *which could not be delivered in France in consequence of the action taken by the American Government.*

We apply to you in order that you may protect important French interests seriously compromised:

The schooner: 'Malcolm Baxter Junior'.

Shipper: Compagnie Franco-Indo-Chinoise, 23 Rue de la Pepiniere, Paris.

Cargo: 500 tons of Maize Starch, and 200 tons of Malt.

Date of Purchase and Payment: June, 1917 (Before prohibition).

Value of the cargo: 1,700,000 francs.

Departed from New Orleans July, 1917.

Called at Key West and Havana.

*Stopped by the American Government.*

Discharged at New York on 6th February, 1918.

Shippers request:

First: That the French Government interfere with the American Government in order that the goods may be re-shipped (preceding Steamer 'Franklin', 'Matanzas', 'Osage', having loaded different cargoes from various schooners).

Second: Authorization to enter the goods bought and shipped three months before Prohibition (preceding many shipments of Rhum).

We beg you to take our request in consideration, and remain" (Italics ours.)

That Exhibit—Claimants' Exhibit 106-A—was offered in evidence by counsel for petitioner Compagnie Franco-Indo-Chinoise in connection with the testimony of the witness Ehrhardt, who was one of the eight "directors" (R. 539) of the Compagnie-Franco-Indo-Chinoise. Ehrhardt's testimony in connection with that Exhibit is as follows:

"Q. (Handing paper.) I show you also what appears to be a carbon copy which you have produced of a letter addressed to the Ministry of Commerce, February 22, 1918, with a translation annexed, and ask you if that is a carbon copy of one of the letters which you wrote to the Ministry of Commerce, and whether the translation is one which you have just made. A. Yes.

Mr. Maclay: I offer the carbon copy of the letter in evidence, together with the translation.

(The Commissioner: The carbon copy is admitted and marked Exhibit 106, the translation 106-A.)

(The papers were admitted in evidence and marked Exhibits Nos. 106 and 106-A, January 19, 1923, A. G.)" (R. 587, 588).

Claimants' Exhibit 107-A, printed at page 747 of the Record, reads in part as follows:

"Schooner 'Malcolm Baxter, Junior.'

Referring to our telephone conversation we had some days ago, we were informed that you received

a telegram from our correspondent in New York advising that this schooner, *after having called at Havana, received instructions from the American Government not to continue her voyage to France*, but to proceed to New York and discharge her cargo.

We believe that in order to safeguard our interest in this transaction, we should inform the underwriters of the maritime risk as well as the war risk, of this fact."

That Exhibit was dated January 24, 1918, and was signed by the petitioner Compagnie Franco-Indo-Chinoise (R. 589).

Claimant's Exhibit 103-A, printed at page 744 of the Record, reads as follows:

"Minister of Commerce
Industry, Post and
Telegraph

27 February, 1918

To La Compagnie Franco-Indo-Chinoise

By your letter of the 22nd of February, you have explained to me the details of your petition concerning lot of goods paid for, *which have not been delivered in France in consequence of the action of the American Government*.

I beg to inform you that my service of commercial transports is considering the matter which will be submitted at the next meeting of the Comite Executif des Importations."

That Exhibit was offered by the petitioner Compagnie Franco-Indo-Chinoise at page 586 of the Record.

Respondent's Exhibit 78, printed at pages 733 and 734 of the Record, is a letter (offered at page 532 of the Record) dated January 10, 1918, from the Societe Generale de Credit Ind. & Comm. to Messrs. Kountze Bros., New York City, the representative of petitioner Compagnie Franco-Indo-Chinoise (R. 466), reading in part as follows:

> "THE VOYAGE OF THE SCHOONER 'MALCOLM BAXTER JUNIOR' HAVING BEEN INTERRUPTED UPON THE ORDER THE GOVERNMENT OF THE UNITED STATES OF AMERICA, THE SAID SCHOONER HAS BEEN OBLIGED TO GO TO NEW YORK TO DISCHARGE ITS CARGO" (R. 734).

At page 617 of the Record, counsel for petitioner, Compagnie Franco-Indo-Chinoise, stated on the Record:

> "'Malcolm Baxter, Jr.' sailed from New Orleans for Bordeaux, France. The schooner sailed with this cargo in question on board from New Orleans in August, 1917. She put into Key West in leaking condition, and was then sent to Havana, where considerable repairs were made, the cargo was discharged and reloaded and she then proceeded, after other troubles, to New York, *where the voyage was abandoned.*
>
> The Commissioner: She was left abandoned in January, 1918.
>
> Mr. Maclay: I think it was January 28th, 1918, when she arrived at New York."

According to the admission of counsel for the petitioners on the record, therefore, this is not a case where unseaworthiness has prevented a vessel from leaving the loading port so that the contract can be considered as ended before the voyage began.

Even the petitioners' pleadings allege that the voyage began but that it was discontinued on January 14, 1918, by a deviation in sailing from Havana to New York, instead of to Bordeaux, and was finally abandoned at New York. The claims of Compagnie Franco-Indo-Chinoise and the Engineering Timber Co., Ltd., who shipped the starch, malt and lumber and who are the principal claimant-petitioners, allege that after loading the cargo:

> "Thereafter the 'Malcolm Baxter, Jr.' put to sea and started on her voyage to Bordeaux. She did not, however, continue and complete said voyage, but on account of her unseaworthiness on sailing was obliged to put into the port of Havana, where she remained for a considerable period of time and then *deviated to the port of New York.*
>
> After the 'Malcolm Baxter, Jr.'s' arrival at New York, her owner REFUSED TO PERMIT HER FURTHER TO PERFORM HER VOYAGE but declared its intention to abandon the voyage, and required that the libellant discharge and take possession of its cargo at New York" (R. 32, 29).
>
> "The abandonment of the voyage and the *deviation to New York* were caused by the fact of such unseaworthiness" (R. 33, 30).
>
> "There is at the present time some uncertainty as to whether the necessary permission to export the starch can be obtained" (R. 34).

It thus appears from these claimants-petitioners' pleadings that the voyage did not actually stop until the alleged abandonment at New York, and that it did not legally stop until the alleged deviation by sailing from Havana for New York instead of Bordeaux (R. 32).

The remaining claim, that of the French Republic, alleges that

> "The schooner 'Malcolm Baxter, Jr.' put to sea and started on her voyage to Bordeaux, but did not continue and complete said voyage, but on account of her unseaworthiness on sailing was obliged to put into the port of Havana, where she remained for a considerable period of time and then deviated to the port of New York. After the 'Malcolm Baxter, Jr.'s' arrival at New York, her owner REFUSED TO PERMIT HER FURTHER TO PERFORM HER VOYAGE AND DECLARED ITS INTENTION TO ABANDON THE VOYAGE and required that the claimant discharge and take possession of its cargo at New York" (R. 25).
>
> "On account of said unseaworthiness the Schooner put into Havana, deviated to New York and finally abandoned the voyage" (R. 25).

The answer of the French Republic alleged

> "that she put into Key West; that she later deviated to Havana, Cuba, and New York; and that the cargo was discharged and reloaded at Havana" (R. 13).
>
> "It denies that it has any knowledge or information * * * as to the details of the ship's movements between the time she sailed from New Orleans and put in at New York; as to the nature, diligence and expedition of the repairs alleged to have been affected at Havana; as to the time the vessel was ready to proceed to Bordeaux; as to whether clearance was refused by the American Consul" (R. 13-14).

It admits that proceedings have been brought in this Court by the French Republic to recover dam-

ages sustained by reason of the 'Malcolm Baxter, Jr.'s' abandonment of her voyage" (R. 14).

"Thereafter the Schooner 'Malcolm Baxter, Jr.' put to to sea and started on her voyage to Bordeaux. She did not, however, continue and complete said voyage, but on account of her unseaworthiness on sailing was obliged to put into Key West, Florida, Havana, Cuba, and after remaining at either or both of these ports for a considerable time she deviated to the port of New York.

5. After the Schooner 'Malcolm Baxter, Jr.' arrived at New York, her owner, the petitioner, *refused to permit her further to perform her voyage*, declared its intention to abandon the voyage, and required that the claimant take possession of its cargo at New York" (R. 16).

"Tenth: Further answering the petition herein, the claimant alleges that at the time when the 'Malcolm Baxter, Jr.' arrived at New York and abandoned her voyage she was of the value of $195,000" (R. 17).

Moreover, the uncontradicted evidence is that the *Malcolm Baxter* did not stop at New Orleans but sailed 658 miles to Key West, then proceeded to Havana, and then to New York and there redelivered the cargo.

We respectfully submit, therefore, that the statement of counsel for petitioners in their petition and brief that the voyage of the *Malcolm Baxter* was stopped at New Orleans or before the Embargo was levied is unwarranted either by the pleadings or the evidence.

The ability of the *Malcolm Baxter* to proceed on her voyage was a physical fact to be established by evidence.

This fact was so established, as we have shown by the excerpts above. The *Baxter* could not complete her voyage to Bordeaux because she was legally prevented from leaving Havana by the refusal of the American Consul to give clearance to Bordeaux. These facts have been established by evidence and are of course questions of fact, not of law. The hypothetical situations presented in the petitioners' brief as the basis of their elaborate argument, of course, never existed and could never exist under the findings of both courts below. As we have said above, the petitioners have struggled to avoid the necessary consequence of the finding of the District Court and of the Circuit Court of Appeals respecting the refusal of the Consul to grant clearance. So far as we can ascertain from a careful reading of their brief, the petitioners in order to present their case have been forced to ignore it.

Both Courts below have found this as a fact and there is not a scintilla of evidence that the schooner was not perfectly seaworthy when clearance was then asked or that she would not have proceeded on to Bordeaux and delivered the cargo if the embargo had not prevented her. It is thus evident that under the guise of "questions of law" based on an inaccurate and incomplete statement of facts, counsel for petitioners are really attempting in this Court to get around facts which have been found against them by the lower Courts.

Other uncontradicted evidence not even mentioned in the petition for ceritorari is that after the *Malcolm Baxter, Jr.* put in to Key West and was surveyed, the surveyors appointed by Lloyd's agent did not recommend that the voyage be abandoned. On the contrary they recommended

that she be repaired, and continue her voyage. The witness Porter, Lloyd's agent at Key West, who was called by the cargo owners—the petitioners—testified as follows:

> "Q. You recommended that the vessel be repaired and complete her voyage? A. We recommended that she proceed to some nearby Gulf or Atlantic port for repairs.
>
> Q. And you contemplated that the repairs be made? A. It was contemplated, yes, that after repairs were effected that she would proceed.
>
> Q. You saw no reason why repairs could not be made? A. No, sir" (R. 292).

In so far as the witness preferred some American port to Havana, it appears that the only reason that Mr. Porter gave in his telegram to the petitioner for preferring some other port to Havana, was that it would cost more to effect the repairs in Havana than in an American port. See his telegram, French Overseas Corporation's Exhibit "B", printed at page 294 of the Record, where he says:

> "Key West, Fla., Sept. 13th, 1917.
>
> "French Oversea Corporation,
> 120 Broadway, New York City.
>
> 'Malcolm Baxter, Jr.' No doubt repairs can be effected Havana, but dont consider advisable send vessel there account its being a most expensive port to effect repairs, besides liability complications arising through having to bond cargo discharged and stored there while vessel under repairs, being foreign country with arbitrary customs regulations. Stop. If possible secure tow think advisable send 'Baxter' to some Atlantic port for repairs.
>
> Wm. P. Porter, Lloyd's Agent."

The vessel did proceed to Havana to effect repairs. Captain Loveland testified that the repairs were completed at Havana as fast as circumstances would allow, according to the recommendations of the surveyors employed by Lloyd's Agents (Loveland, R. 267).

She was made in all respects seaworthy at Havana to continue the voyage to Bordeaux. As to this the trial court said:

> "The boat was towed to Havana and discharged. Again she underwent extensive repairs of a structural nature. Upon their completion in January, 1918, the vessel was inspected and pronounced seaworthy. A new master having supplanted Loveland, he went to the office of the American Consul in Havana to sign on new members of the crew, and learned of the embargo that had been placed on wooden ships. The ship, therefore, when ready to depart, left for New York" (R. 305-6).

At Havana, on October 31, 1917, surveyors recommended certain repairs and renewals (R. 239-241). The uncontradicted evidence, without objection, is that every one of the requirements in this survey report (which was introduced by petitioners—R. 173, 239) was fully and adequately completed (excepting unshipping the rudder which was held unnecessary and has nothing to do with any damage in this case) before January 9, 1918 (R. 212-213).

Both Courts below have held the respondent liable for all damages flowing from the unseaworthiness and if the petition for certiorari is denied by this Court the petitioners will prove and recover all such damages. Although the petitioners received back their cargo in exactly the same

sound condition as when it was shipped with the exception of a small part which was damaged by seawater and handling, they are asking this Court to give them additional damages which, as a plain matter of fact, they sustained solely because the American Consul at Havana in carrying out the embargo order would not give the master of the schooner his clearance and other ship's papers so that he could proceed on to Bordeaux with his then absolutely seaworthy vessel. But unseaworthiness does not preclude a defense that performance was discontinued because further performance would be illegal and it is clear that neither the Court below nor any other Court has ever so held. The identical proposition now advanced by petitioners was argued by counsel in *Atlantic Shipping Co.* v. *Louis Dreyfus & Co.*, [1922] 2 A. C. 250, 257, a case much relied upon by petitioners. Lord Dunedin considered it during the course of his judgment in that case and disposed of it as follows:

> "It is quite true that the fact of unseaworthiness does not destroy the contract of affreightment *in toto*. Such a doctrine would lead to absurd consequences * * *."

The final conclusion of the trial court was wrong simply because it misapprehended the facts in the controlling case (*Ellamerdale Corp.* v. *Vacuum Oil Co.*, 248 U. S. 377) decided by this Court, and assumed that a restraint of princes clause was necessary to justify a defense on the ground of illegality. The materiality of this mistake of the trial court is shown by its extensive discussion of due diligence to make the vessel seaworthy and its discussion of the right of the petitioners to limit their liability which would

only become issues in this case if the petitioners were relying on a contract exception and not on illegality.

The statement on page 8 of the Petition that

> "Upon the completion of repairs at Havana, no application for a clearance was made on behalf of the schooner 'Malcolm Baxter, Jr.'

is not only unwarranted by the evidence, but is flatly in conflict with an opposite concurrent finding by both Courts below. A similar contention was made by counsel for the petitioners in the trial court, but the fact was there found against them by the Court as follows:

> "Before proceeding to take up the question as to whether the unseaworthiness of the 'Baxter,' or the embargo placed upon sailing vessels, brought about the abandonment and frustration of the voyage, it is necessary to deal with Claimants' contention that the 'Baxter' made no effort to obtain a clearance from Havana for Bordeaux. It is said that in certain instances sailing vessels were permitted to clear for points beyond the war zone, and that, inasmuch as a part of the 'Baxter's' cargo was for the French Republic, there is reason to suppose that she too, might have been permitted to go forward, assuming her fitness to do so. There is, however, no proof that exceptions were granted by the Government, or that one would have been granted in this instance.
>
> Captain Creighton was told by the U. S. Consul in Havana that if clearance for Bordeaux were applied for it would be refused. In the absence of any proof other than now in the record, I shall assume that the embargo was rigidly applied and that the ship would not have been permitted to go on her way" (Opinion, District Court, R. 310-11).

The Circuit Court of Appeals found as follows:

> "The embargo was an unusual exercise of power by the Government, a permanent restraint making the sailing of a ship illegal and therefore impossible, and rendering that illegal which had previously been legal. *Allanwilde Corp.* v. *Vacuum Oil Co.*, 248 U. S. 377, *Inst. Paper Co.* v. *The Gracie D. Chamber*, 248 U. S. 387, *Standard Varnish Works* v. *The Bris*, 248 U. S. 392.
>
> The contract to carry the cargo to Bordeaux, which after making the repairs the ship was ready to perform, was thus by the embargo rendered illegal and impossible of further performance, entirely independent of any exception or express agreement of the parties" (R. 1171).

The Circuit Court of Appeals also found:

> "During the making of the repairs at Havana, and on September 29, 1917, the United States Government levied an embargo, which prevented the schooner or any other sailing vessel from clearing for a voyage to Bordeaux or through the submarine zone" (R. 1167).

This finding is of course the most important fact in the case and it has been omitted by counsel for petitioners from the statement of facts in the petition and ignored throughout their argument. This and other equally serious inaccuracies in the facts stated in the petition and accompanying brief show that counsel for petitioners are really trying to attack in this Court the concurrent findings of both Courts below. On the bold assumption that this Court will

reverse the concurrent findings of the lower Courts, counsel for petitioners then proceed to cite decisions and argue the case as if the findings below no longer existed. This Court has often declared that it will not grant certiorari for the purpose of having the evidence reviewed before it to determine whether concurrent findings of fact by the Courts below are sufficiently established. We shall, therefore, not review the evidence in this brief, but we do call the Court's attention to the fact that a granting of the petition will result only in an extended controversy before this Court regarding the sufficiency of the evidence to establish the facts which the Courts below have concurrently found in favor of the respondent.

The entire petition and supporting brief are, as we have indicated, based on the mistaken assumption that the respondent was relying not on illegality but on a special contract provision of "restraint of princes or otherwise". A reading of the opinion of the Circuit Court of Appeals will disclose that no such contract provision is mentioned. Indeed, at pages 4 and 5 of the respondents-appellants brief in the Circuit Court of Appeals, we said:

> "* * * appellants call attention to the fact that they are relying on illegality and not on a contract exception of 'restraint of princes', and also to the fact that the trial court here inadvertently misstated the facts in the *Allanwilde* case (R. 311), in the Supreme Court of the United States, in which also the shipowner was relying on illegality, there being no contract exception. Unseaworthiness does not preclude a defense that performance was discontinued because further performance would be

illegal, and it is clear that the trial court did not mean to so hold. It seems, therefore, that the trial court decided this case on a clear mistake regarding the legal nature of an embargo or Government interdiction and on a misapprehension of the facts in the controlling case decided by the Supreme Court of the United States. The materiality of this mistake of the trial court is shown by its extensive discussion of the question of due diligence to make the vessel seaworthy which would only become an issue if petitioners were relying on a contract exception of negligence and not on illegality."

The following statements, therefore, of counsel for petitioners in their petition and accompany brief are erroneous:

"3. Whether the doctrine of frustration of adventure by 'RESTRAINT OF PRINCES' MAY BE INVOKED BY A PARTY TO A CONTRACT whose breach of the essential warranty of seaworthiness was the proximate cause of bringing the vessel within the operation of the restraint?

The Court of Appeals held THE SHIPOWNER MIGHT INVOKE THE EQUITABLE DEFENSE OF FRUSTRATION not withstanding the fact that the initial unseaworthiness, with which the shipowner was in privity was the sole cause of bringing the vessel within the 'RESTRAINT'" (Petition, p. 3).

• • • • • •

"II. The questions presented ..... 13

A. Can an owner who is not entitled to limit its liability because it is privy to the unseaworthiness of the vessel, nevertheless RELY ON PROVISIONS OF THE SPECIAL CONTRACT OF THE BILL LADING? ..... 13"

(Table of Contents, p. 1.)

* * * * * *

"First Point—The Decision of the Circuit Court of Appeals herein is contrary to the weight of authority, including the decisions of this court, in respect to the effect of a breach of warranty of seaworthiness ON THE SPECIAL CONTRACT OF THE BILL OF LADING ..... 34"

(Table of Contents, p. 3.)

* * * * * *

"1. Whether a breach of the warranty of seaworthiness on sailing, so flagrant as to force both Courts below to refuse to allow the shipowner to limit his liability, has any effect ON BILL OF LADING CLAUSES IN FAVOR OF THE SHIP OWNER, such as the clause allowing him to retain prepaid freight?" (Petition, pp. 2-3).

* * * * * *

"A. Can an owner who is not entitled to limit its liability because it is privy to the unseaworthiness of the vessel, nevertheless RELY ON PROVISIONS OF THE SPECIAL CONTRACT OF THE BILL OF LADING?" (Petition, p. 13).

* * * * * *

"Although the Circuit Court of Appeals held the shipowner, because of its culpable failure to perform its warranty of seaworthiness, not entitled to limit its liability, the court nevertheless HELD THE SHIPOWNER ENTITLED TO RELY ON THE DEFENSE OF RESTRAINTS OF PRINCES AND ALSO ON THE PREPAID FREIGHT CLAUSE OF THE BILL OF LADING" (Petition, pp. 13-14).

* * * * * *

> "THE DECISION OF THE CIRCUIT COURT OF APPEALS HEREIN IS CONTRARY TO THE WEIGHT OF AUTHORITY, INCLUDING THE DECISIONS OF THIS COURT, IN RESPECT TO THE EFFECT OF A BREACH OF WARRANTY OF SEAWORTHINESS *on the special contract of the bill of lading*" (Brief in Support of Petition, p. 34).
>
> • • • • • •
>
> "The ship and her owner, being THEN UNABLE TO RELY ON ANY CLAUSES IN THE BILLS OF LADING, would be responsible to the cargo for all of the damages for failure to deliver at destination, including the return of the prepaid freight, as the District Court held (R., fol. 936)" (Brief in Support of Petition, p. 41).
>
> • • • • • •

It is thus evident that the case that counsel for the petitioners have stated and argued is not the one that is shown by the Record in this case and that has been passed upon by the two lower Courts.

The statements of counsel for the petitioner at page 5 and elsewhere of the petition and supporting brief, with reference to the extent of unseaworthiness of the schooner, are entirely unjustified by the evidence or findings. For example, on page 5 of the petition, counsel for petitioner states:

> "Both of the lower courts have found that before the voyage commenced the 'Malcolm Baxter, Jr.' was so structurally defective and so unseaworthy as to be incapable of performing the voyage without extensive repairs"

and that the respondent failed—

> "to make any attempt to discover the vessel's condition before she struck ground for the voyage."

The fact is that the Circuit Court of Appeals in its opinion found as follows:

> "The master of the 'Baxter' did not leave New Orleans with the knowledge that he would have to make a port for repairs, but honestly thought he could make the trip in safety, and tried unsuccessfully so to do. The leak was not discovered until after the ship had left New Orleans and anchored at Port Eads, and it was the condition of the ship and intention of her master when she left New Orlaens, and not when she left Port Eads, that is controlling • • •. Even when the ship broke ground at Port Eads, the master was not certain that he would be compelled to seek a port of refuge. To seek a port of refuge, if in the judgment of the master the safety or best interests of crew, ship, or cargo requires it, when a ship is unseaworthy from unfitness of structure, is not a deviation. The *Turret Crown*, 297 Fed. 766.
>
> In the last cited case we followed the House of Lords in *Kish* v. *Taylor* (supra) which was a case of unseaworthiness from unloading and in which case it was held that it is the presence of the peril, and not its cause, which determines the character of the deviation. The Circuit Court of Appeals in the Fourth Circuit also followed *Kish* v. *Taylor*, supra, in *Turret Crown*, 284 Fed. 439. This holding is not inconsistent with the decision of the Supreme Court in *The Willdomino*, 1927 A. M. C. 129, and the House of Lords in *U. S. Shipping Board* v. *Bunge y Born*, (1925) 31 Com. Cas. 118; 23 L. L. Rep. 257, in which cases the deviations were caused by the ships leaving port with insufficient fuel. The distinction is plain. • • • The circumstances under which the

> 'Baxter' put into Key West and Havana were not caused by gross negligence, as that term is used in the opinion in *The Williamino*, supra, because it was not plain when she left New Orleans that deviation was inevitable."

Moreover it is grossly inaccurate for counsel for petitioner to say at p. 5 of their brief that both of the lower Courts have found that

> "The respondent failed to make any attempt to discover the vessel's condition before she broke ground for the voyage (R. pp. 307, 310, 1167, 1168)."

None of the pages of the record cited by counsel for the petitioner support that statement and the fact is that neither court below made such a finding and the evidence is overwhelmingly to the contrary. It is undisputed that the schooner was seaworthy enough so that she actually carried all this cargo more than 2,000 miles from New Orleans to Key West, Havana, and then, after the embargo was declared, to New York and redelivered the cargo to the petitioners in the same sound condition as when shipped, with the exception of a very small amount of sea water damage, together with some damage resulting from handling during discharge of part of the cargo and reloading at Havana. dling damage, refund of general average deposits, fall or

At p. 13 of the petition counsel for the petitioners admit that the entire damage to the cargo as claimed by them which resulted from the unseaworthiness (as distinguished from the embargo) amounts only to "about one-fourth" of the sum which the trial court mistakenly awarded them. When it is observed that the damages awarded by the Cir

cuit Court of Appeals include all sea water damage, handling damage, refund of general average deposits, fall or loss of market value on account of delay resulting from unseaworthiness, etc., it is apparent that the sum awarded by that court is the full amount which the petitioners should be permitted to recover.

At p. 13 of the petition it is said:

> "The result of this modification by the Circuit Court of Appeals of the damages recoverable by the cargo owners is to relieve the owner of the 'Malcolm Baxter, Jr.' from the greater part of the damages sustained by the cargo and to reduce the cargo's recovery from $391,741.26, including interest, to an amount not yet fixed but which is likely to be about one-fourth of that sum."

Counsel for the petitioner are in error in implying on p. 13 of the record that there were any "damages sustained by the cargo" in addition to the damages which they are actually recovering under the decision of the Circuit Court of Appeals in this case. What the petitioners are asking is in fact that the court declare what is not submitted, namely, that there was a total loss of the entire cargo notwithstanding that practically all of it was redelivered to the petitioners at the end of a 2,000-mile voyage, in the same sound condition as when they shipped it.

The cargo was discharged from the *Malcolm Baxter, Jr.* at Pier 15, Brooklyn, and was carefully surveyed by surveyors representing the shippers, cargo owners and underwriters (R. 690-693). It was found that all the cargo of the *Malcolm Baxter* was in the same sound condition as when shipped at New Orleans, excepting some small sea-

water damage and some handling damage from loading and re-loading at Havana merely requiring recoopering or re-bagging.

The two principal items of cargo were starch and malt and these are the two principal items in the final decree below. The amount ($187,569.36) awarded in the final decree to the claimant suing for damages to the starch and malt in fact amounts to a total loss (less salvage by forced sale) of the starch and malt (R. 1075). The fact as found by the Commissioner and confirmed by the trial court was that 3,595 bags out of a total of 4,076 bags of malt were actually delivered by the *Malcolm Baxter* at New York in the same sound condition as when shipped at New Orleans (R. 767) and that 3,766 bags out of a total of 4,000 bags of starch were delivered by the *Malcolm Baxter* at New York in the same sound condition as when shipped (less a small sum for reconditioning 419 slack bags by pouring one into the other to make them full) (R. 692, 767). In other words, sea water damaged only 481 bags of malt and 234 bags of starch. The entire value of the bags damaged by sea water is trivial as compared with the award in the final decree with respect to the malt and starch, which is based on loss of market.

The damage was small appears from the following admission of counsel for petitioner (R. 626):

> "The starch was re-examined in July, and it was found that although all of this except apparently a small matter of about 200 bags of slacks, so-called, were supposed to be sound. On examination, however, it developed that the moisture had penetrated into that and there was a second reconditioning op-

eration. The result of that was a sale of part of the stock as damaged; in other words, the damaged from the second reconditioning was sold at about one cent a pound. That amounted to 35,000 pounds; it was not very large, you see, because the entire shipment consisted of originally about 1,000,000 pounds."

Similarly, all excepting 44 hogsheads (R. 715) of the 916 hogsheads of tobacco shipped (R. 223, 224, 706, 707), were carried to New York and redelivered without any water damage whatever. The 44 hogsheads were damaged "estimated at 25 per cent" (R. 750). The remaining tobacco damage consisted merely of breakage and loosening of staves in the hogsheads (R. 715) and is explained by the fact that 251 of the hogsheads were shipped in bad condition under a foul bill of lading: "Old casks—in bad condition—contents exposed, wet and stained. All recoopered. Ship not responsible for contents" (R. 707).

The steel billets (R. 760) were not damaged at all by sea water or handling, and the lumber (R. 765) and other loose cargo had an inconsequential amount of physical damage.

It is apparent that the total physical damage to cargo amounts to a very small part of the damages awarded by the final decree.

The *Malcolm Baxter* thus carried the cargo more than 2,000 statute miles (Table of Distances, Hydrographic Office, page 144) with only a very small amount of sea-water damage. On the voyage from Havana to New York "she encountered a storm of considerable severity and once more she began to leak" (R. 306), but the master testified that

this leak was "nothing at all because it is only a small amount of water. It would be pumped out so quick" (R. 133). Counsel for petitioners overlook the fact that the "three feet of water in twelve hours" (R. 133) has no significance because it was measured at the bow and at the stern which were both lower than the amidships portion of the schooner because of the much discussed hog. They also overlook the further fact that the small quantity of water which might have found its way into the hold merely filled the interstices between the pieces of lumber, steel billets and various parts of the vessel. Three feet of water measured in this manner obviously did not represent a body of water three feet deep, 45 feet wide and 226 feet long (R. 218) which counsel for appellees apparently assumed leaked into the vessel.

The petitioner, French Republic, alleged in its answer:

> "The claimant alleges that at the time when the 'Malcolm Baxter, Jr.' arrived at New York and absandoned her voyage, she was of the value of $195,000" (R. 17).

The petitioner, Engineering Lumber Company, Limited, and the petitioner, Compagnie Franco-Indo-Chinoise, alleged in paragraph Fifth of their answers as follows:

> "It denies that the value of the said sailing vessel 'Malcolm Baxter, Jr.' at the time alleged in the petition was $80,000 and alleges that the value at that time was $195,000.00" (R. 20, 22).

The time referred to in the petition of the French Overseas Corporation was:

"SIXTH: The value of the sailing vessel 'Malcolm Baxter, Jr.' at the termination of said voyage when the aforesaid embargo prohibited her from continuing the voyage on which she was then engaged, amounted to the sum of Eighty thousand ($80,000) Dollars" (R. 8).

Obviously no schooner unable to perform a voyage or so unseaworthy as counsel for petitioner would have this Court believe, could be worth even in war time any of such large sums as the petitioners themselves allege under oath she was worth.

The fact is that in view of the so-called implied warranty of seaworthiness, even a very slight defect in the schooner would be sufficient to constitute "unseaworthiness" as that term is used by an admiralty court.

In view of the inaccurate and misleading statements of counsel for the petitioners with reference to the extent of the defects constituting unseaworthiness of the *Malcolm Baxter, Jr.*, we call the Court's attention to the following evidence:

The *Malcolm Baxter, Jr.* was a four-masted schooner, built in 1900 at Camden, Maine, with three decks and an elliptic stern; length 226 feet, breadth 45 feet, depth 20.8 feet, gross tonnage 1,732, net tonnage 1,479 (R. 217-218). Ever since she was built she had been maintained at an A-1 classification in the American Bureau of Shipping, the highest classification for wooden vessels. At the end of fifteen years, she was surveyed by the Chief Surveyor for the Classification Society who laid out what her owners must do to obtain a re-classification. After this was done, she was reclassed A-1, the highest rating under a classifica-

tion certificate, good for six years—that is, until the end of the year 1921 (R. 64, 63, 145). On September 14, 1916 (R. 56, 54, 55, 57, 58, 59) her A-1 class was temporarily suspended because of straining on the previous voyage (R. 62). She was put on drydock at Tietjen & Lang's Drydock at Hoboken and thoroughly surveyed by the Chief Surveyor for the American Bureau of Shipping, Captain Proctor (R. 56), and by Surveyor Gardner (R. 194). No rotten wood was found anywhere in her (R. 59, 194). On recommendation of Captain Proctor, she was then practically rebuilt, under the personal supervision of Captain Proctor (R. 56), Captain Gardner (R. 197, 203) and foreman carpenter and joiner Kingley (R. 104), at Tietjen & Lang's shipyard (R. 56 to 59). On completion of this rebuilding, the *Malcolm Baxter, Jr.* was reclassed A-1 under a certificate good until the end of the year 1921. She remained in New York Harbor until June, 1917 (R. 115). She then proceeded to New Orleans, loaded a coal cargo, carried it to Havana, and returned light to New Orleans (R. 113). She sustained no casualty or damage of any sort. She got into no trouble of any kind, between the completion of the rebuilding at Titjen & Lang's in New York and final arrival back in New Orleans light from Havana, after carrying the single cargo of coal (R. 114). In July, 1917, she began loading the present cargo of steel billets, malt, starch, lumber and tobacco. During July, after loading a part of the cargo, mostly steel billets (R. 257), her master, Captain Clark, was relieved as master by Captain Loveland. Loveland continued loading her cargo, she at that time being owned and operated by the Maritime Transportation Company (R. 256). Mr. Green of that Company employed Captain Loveland, and

Mr. Gage of that Company was the ship's agent (R. 256). In the latter part of July, 1917 (R. 49, 51), when she had almost completed loading (R. 41), the petitioner, the French Overseas Corporation, purchased the *Malcolm Baxter, Jr.* subject to the charter party already executed (R. 40, 49, 51) for $172,000. or $175,000. (R. 50), on condition that she was classed A-1 in the American Bureau of Shipping (R. 40, 213-214). After the purchase, some differences arose between the charterer and the petitioner (R. 40). Petitioner, therefore, sent Mr. Sickler, an employee, but not then an officer, of petitioner, to New Orleans to adjust these differences with the charterer (R. 40). He arrived at New Orleans on August 1, 1917 (R. 41). The schooner had then just about finished loading her cargo (R. 41). Mr. Gage, the ship's agent or loading agent for the previous owner, the Maritime Transportation Company, who had been on board the schooner before she was loaded and practically every day during her loading (R. 108), and had had her surveyed by surveyors Japha and Thomsen (R. 109, 110, 204), was taken over as an employee by the petitioner, as ship's agent at New Orleans. After the purchase by petitioner (R. 108), Captain Loveland was also taken over as an employee of petitioner (R. 256). Surveyor Japha of the New Orleans Board of Underwriters surveyed the schooner while loading (R. 109, 204), and on completion issued a certificate of the Bureau of Inspection of the New Orleans Board of Underwriters, dated July 25, 1917, that she had completed loading her cargo under the Board's inspection, and had conformed to all its rules and "that she is now properly laden to proceed on her voyage to French port, Wm. Japha, Surveyor" (R. 204, Trial Exhibit 1). Surveyor Japha died

before this case was reached for trial (R. 151). Surveyor Thomsen testified that he examined the ship before she sailed from New Orleans and that, in his opinion, she was in seaworthy condition to make a trip from New Orleans to France (R. 297). Captain Loveland in his sworn protest, on September 18, 1917, also certified that the schooner was seaworthy on sailing from New Orleans (R. 276, 279, 267, 268). Ship's agent, Gage, testified that he was on board the schooner while Surveyor Japha and Surveyor Thomsen made their surveys (R. 109-110) and was on board practically every day while she was at New Orleans (R. 108), and that the schooner had not been damaged or in any trouble on the voyage to Havana or return (R. 114). President Mayer of the petitioner testified that he had never seen the *Malcolm Baxter, Jr.* and that so far as the Company was concerned, the *Malcolm Baxter, Jr.* was left entirely in the hands of Mr. Carpenter, its Vice-President (R. 191). Vice-President Carpenter testified that the schooner was in fact classed A-1 at the time of purchase (R. 103); that he relied on her rating and had never seen her, and that at his direction one of the Company's employees, Mr. Sickler, was to look after *her* and that he went to New Orleans and did so (R. 103).

If there had been any leak in her of any kind, both Captain Loveland and Chief Mate Clapp, who were called as witnesses by the claimants-appellees, would have known it, as also would the two surveyors, Japha and Thomsen. Neither Loveland nor Clapp was friendly to the petitioner, both voluntarily testifying for the claimants in this proceeding. It is obvious that if there had been any known weakness these men would have disclosed it.

There is not a word of testimony that at any time during the entire voyage from New Orleans until final arrival at New York the pumps were not able to prevent the sea-water coming through the leaks from rising to a height of more than two feet above the floor of the cargo space (R. 251) at any time,—which would not bring it above the steel billets and lumber stowed in the bottom of the holds (R. 251). Chief Mate Clapp, a witness for petitioners, testified that he was unable to say that the leaks had any influence on the bags of starch or malt (R. 250) which formed the principal item of damages awarded by the trial court.

The actual carriage by this schooner of this cargo, over more than 2,000 miles, with only very slight sea water damage, is demonstrative evidence that she was in all except minor respects physically fit to do that which she actually did do, namely, deliver the cargo at the end of a 2,000-mile voyage in the same sound condition as when shipped. The handling damage, which the uncontradicted evidence shows is the principal item of the entire physical damage to cargo, resulted collaterally and independently from negligent acts of stevedores at Havana and, of course, has nothing to do with the question of seaworthiness or unseaworthiness.

In addition to all physical damage of every kind and character that their cargo suffered, the petitioners are also recovering, under the decision of the Circuit Court of Appeals, all fall or loss in market value of their cargo resulting from the delay caused by unseaworthiness. It would be most inequitable, we respectfully submit, to award them the still greater sum claimed on the incorrect hypothesis that their cargo became a total loss because the United

States Government levied an embargo, which both courts below have found prevented the schooner from obtaining her clearance and actually proceeding to Bordeaux and delivering the cargo to the consignees.

As we have shown above, there is no real question of law involved in this case. The decision turned on the single question of fact found by both courts below that the schooner would in fact have sailed from Havana for Bordeaux and delivered the cargo if the American Consul at Havana, in carrying out the United States Government's Embargo, had not refused clearance.

Nor is there any conflict between the decision below and any decision of this Court or of the Circuit Court of Appeals of any other Circuit. The decisions cited in the brief supporting the petition are simply irrelevant to the present case because they either do not involve the question of illegality or their facts are plainly distinguishable.

The opinion of the trial court in the case of the schooner *Henry W. Cramp, Francis J. McDonald, claimant*, v. *Albert T. Rosasco*, was ~~decided and~~ filed before either the briefs were submitted or this case argued in the Circuit Court of Appeals and none of the several counsel who appeared separately in that court, considered it relevant enough to cite. The *Henry W. Cramp* is obviously distinguishable because in that case there was a positive, intentional act of deviation by the shipowner in ordering the master of the schooner to put into the port of Norfolk and not to perform the voyage. The Circuit Court of Appeals found as a fact that this act of the shipowner was wholly unexplained. The Circuit Court of Appeals said (Petitioner's brief, p. 27):

> "It is unfortunate for the schooner that the master is dead, by reason of there being no proof by him, and that no one on board the vessel could be found, in spite of search, to prove any of the acts necessitating the vessel seeking harbor at Norfolk, but the failure of the vessel to give any notice of her going to Norfolk and remaining there more than two months without informing the charterers, and doing so then only on inquiry by the charterers, is a course of unexplained conduct not calculated to inspire confidence in the alleged purpose of the vessel to complete this contract of affreightment."

A reading of the opinions of the courts below in the present case will disclose the obvious fact that there is no evidence whatever that the respondent here committed any intentional, unexplained act such as was committed by the owner of the *Henry W. Cramp*. This is pointed out very clearly by the Circuit Court of Appeals in its opinion in the present case. The distinction is "plain" between a case such as the *Henry W. Cramp*, in which there is an intentional unexplained act of the owner of a schooner in ordering her master not to continue performance of the voyage, and a case such as the present in which the uncontradicted evidence as recited in the opinion of the Circuit Court of Appeals, shows that it was only after the master of the *Malcolm Baxter, Jr.* had proceeded with the schooner for a distance of almost 600 miles, that he believed that it was necessary to put into a port of refuge.

An examination of the opinion of the Circuit Court of Appeals shows that it relied upon the doctrine in *Kish* v. *Taylor*, 1912 App. Cas. 604 (House of Lords). The facts in that case were thus stated:

> "Unfortunately, he (the master) overloaded his ship with deck cargo to such an extent as to make her unseaworthy. She proceeded to sea, encountered bad weather, and, by reason of her overloaded condition, her master was obliged, in order to save his vessel and the lives of his crew, to take refuge in the port of Halifax. Some of the deck cargo was carried overboard, other portions were jettisoned, other portions damaged, and the vessel herself was so damaged that it was absolutely necessary to have some repairs done upon her and to have a portion of her cargo restowed. The owners have paid for these repairs, and have compensated the owners of the lost, jettisoned, and damaged cargo for the loss they have sustained, and do not claim from any one concerned any contribution on foot of the expenditure thus resulting from their improper act in overloading their ship" (1912 A. C. 604).

In delivering judgment, Lord Atkinson, who spoke for the House of Lords, said:

> "So that the question for decision resolves itself into this: Is it the presence of the peril and not its cause which determines the character of the deviation, or must the master of every ship be left in this dilemma, that whenever, by his own culpable act, or a breach of contract by his owner, he finds his ship in a perilous position, he must continue on his voyage at all hazards, or only seek safety under the penalty of forfeiting the contract of affreightment? Nothing could, it would appear to me, tend more to increase the dangers to which life and property are exposed at sea than to hold that the law of England obliged the master of a merchant ship to chose between such alternatives."

The law as thus laid down by the House of Lords has been followed by the Circuit Court of Appeals for the Fourth Circuit in *The Turret Crown*, 284 Fed. 439; certiorari denied, 262 U. S. 742; and *The Turret Crown*, 297 Fed. 766, certiorari denied, 264 U. S. 591. Indeed, the principle is now accepted not only in this country but in England as firmly established.

There is nothing in the case of *The Henry W. Cramp* which in any way affects the principles involved in this case. In that case there was a positive finding of fact that when the master sailed he intended to deviate. In the present case, there was a positive finding of fact by the Circuit Court of Appeals that when the master left New Orleans he did not intend to deviate but honestly thought he could make the trip in safety. The distinction, as the Court below pointed out, is plain. It said:

> "The Schooner 'Malcolm Baxter, Jr.,' was purchased by the appellant (respondent here) after she had commenced loading for the voyage in question, and no officer of the appellant inspected the vessel before the voyage in question commenced, nor was she drydocked or subjected to an extensive survey. On August 16, 1917, the schooner sailed from New Orleans. The schooner was towed down to the mouth of the Mississippi River, without meeting any severe weather, and came to anchor at Port Eads, where she remained until August 23, 1917. After the schooner had been towed down the river to Port Eads and anchored, a leak forward was discovered and reported to her master. The master exercised his judgment and instead of returning to New Orleans proceeded on his voyage. The leak grew worse, and

after he had sailed 658 miles, he put into Key West, on September 1, 1917, for repairs" (R., p. 1166).

The Court further said: (1168)

"The master of the 'Baxter' did not leave New Orleans with the knowledge that he would have to make a port for repairs, but honestly thought he could make the trip in safety, and tried unsuccessfully so to do. The leak was not discovered until after the ship had left New Orleans and anchored at Port Eads, and it was the condition of the ship and intention of her master when she left New Orleans, and not when she left Port Eads, that is controlling. If going into Key West or Havana for repairs constituted voluntary deviation, then returning to New Orleans from Port Eads for repairs would have constituted voluntary deviation, and when the ship broke ground at Port Eads, she would have had no option but to deviate. To oblige a master of a ship to choose between such alternatives has been condemned. *Kish* v. *Taylor* (1912) A. C. 604, 614. Even when the ship broke ground at Port Eads, the master was not certain that he would be compelled to seek a port of refuge.

To seek a port of refuge, if in the judgment of the master the safety or best interests of crew, ship, or cargo requires it, when a ship is unseaworthy from unfitness of structure, is not a deviation. *Turret Crown*, 297 Fed. 766. In the last cited case we follow the House of Lords, in *Kish* v. *Taylor, supra*, which was a case of unseaworthiness from overload-

ing, and in which case it was held that it is the presence of the peril, and not its cause, which determines the character of the deviation. The Circuit Court of Appeals in the Fourth Circuit also followed *Kish* v. *Taylor, supra*, in *Turret Crown*, 284 Fed. 439.

This holding is not inconsistent with the decision of the Supreme Court in *Willdomino*, 272 U. S. 718, and the House of Lords in *United States Shipping Board* v. *Bunge y Born, Ltd.*, (1925) 31 Com. Cas. 118, in which cases the deviations were caused by the ships leaving port with insufficient fuel.

The distinction is plain. If circumstances under which the ship leaves port are such that it must be known that she will be compelled to deviate, *e. g.*, a shortage of fuel, the deviation is voluntary. If, however, the ship leaves port unseaworthy, which includes one badly stowed, even if it was known, she does not voluntarily deviate if she seeks a port of refuge. We, therefore, hold that the schooner did not voluntarily deviate when she sought a port of refuge at Key West or Havana."

We have quoted at length from the opinion of the Circuit Court of Appeals because we feel that the statement of facts found by the Circuit Court of Appeals, and of the case generally as presented in the Petition for Certiorari, is so meagre that it is quite unfair to that court. It is manifest from reading the opinion of that court that all it did was to find facts which brought the case squarely within a doctrine of the maritime law well established both in the United States and in England.

## Conclusion.

The petition for certiorari should be denied.

Respectfully submitted,

D. Roger Englar,
T. Catesby Jones,
James W. Ryan,
*Counsel for Respondent French Overseas Corporation.*

20

# SUPREME COURT OF THE UNITED STATES.

No. 459.—October Term, 1927.

| | |
|---|---|
| Republic of France, Compagnie Franco-Indochinoise and Engineering Timber Company, Ltd., Petitioners, vs. French Overseas Corporation, as owner of the Schooner *Malcolm Baxter, Jr.* | On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit. |

[May 21, 1928.]

Mr. Justice Stone delivered the opinion of the Court.

Petitioners, in July, 1917, shipped a cargo on the Schooner *Malcolm Baxter*, owned by respondent, from New Orleans to Bordeaux, and prepaid the freight. The bill of lading stipulated "prepaid freight is to be considered as earned in shipment of goods and is to be retained by vessel's owner . . . if there be forced interruption or abandonment of the voyage, at a port of distress or elsewhere." In addition there was the usual clause exempting the vessel from "restraints of princes, rulers and peoples."

After departure from New Orleans the *Baxter* developed leaks due to unseaworthiness which caused her to put in at Key West, where she was surveyed. In order to effect the necessary repairs she was towed to Havana where she was unladen and repaired, remaining there for that purpose until January 14, 1918. Before the completion of the repairs the United States Export Administrative Board put into effect its ruling of November 18, 1917, that sailing vessels would not be permitted to clear for points beyond the war zone. This ruling remaining in force when the repairs were completed, and the *Baxter*, being unable to secure a clearance for Bordeaux, took her cargo on board and proceeded to New York, where the petitioners libelled the vessel in the district court for southern New York to recover freight money, damages to cargo and damages for failure to perform the contract voyage from New Orleans to Bordeaux.

Respondent as owner filed a petition for exoneration and limitation of liability and enjoined further proceedings on the libels. Petitioners filed claims in the limitation proceedings, claiming damages as in the original libels, setting up the deviation and the abandonment of the voyage, by reason of the ship's unseaworthiness on sailing.

The district court denied the petition to limit liability, allowed the claim for freight money and for damages sustained by petitioners, including damage to cargo. A special master, appointed to take proof of damage, found that the measure of damages was the excess cost of the substituted carriage and incidental expenses, and in the case of goods which could not be sent forward the damage was measured by the difference between the value of the goods at the time when and in the condition in which they should have arrived at destination, and their value at the place where and in the condition in which they actually were received, less charges saved plus incidental expenses. Final decree was given to the petitioners for the damage as found.

The court of appeals for the second circuit upheld the ruling of the district court denying exoneration and limitation of liability but reversed the judgment, holding there could be no recovery of the prepaid freight or excess cost of transportation over prepaid freight; that the recovery of damages must be limited to actual damages to cargo resulting from unseaworthiness, and the difference between the value of the cargo had it arrived in Bordeaux on a straight voyage on August 16, 1917, the date when the *Baxter* sailed, and on a voyage leaving Havana January 14, 1918, the date when the repairs were completed and the *Baxter* was ready for sea. The *Malcolm Baxter, Jr.*, 20 F. (2d) 304.

Both courts below agreed that the *Baxter* was unseaworthy on sailing and that respondent failed to exercise due diligence to ascertain her condition before sailing. This was sufficient ground for denying the petition for exoneration and limitation of liability under the Harter Act, Act of February 13, 1893, c. 105, 27 Stat. 445, and acts permitting limitation of liability to the vessel and pending freight. R. S. §§ 4282-4289. The correctness of this determination is not raised on the petition here. *Federal Trade Commission* v. *Pacific Paper Ass'n*, 273 U. S. 52, 66, but petitioners urge that the *Baxter's* putting in first at Key West and later at Havana must be deemed a voluntary deviation because due to the

negligence of the owner in failing to discover the unseaworthiness and to make the vessel seaworthy before sailing.

Unseaworthiness alone or deviation caused by it displaces the contract of affreightment only in so far as damage is caused by the unseaworthiness. *The Caledonia*, 157 U. S. 124; *The Europa*, [1908], P. 84. *Thorley* v. *Orchis S. S. Co., Ltd.*, [1907], 1 K. B. 660; *Kish* v. *Taylor*, [1912], A. C. 604, 618. But if the deviation here is to be classed with voluntary deviations, respondent may not claim the benefit of the clauses of the bill of lading and is responsible for the cargo as insurer. *The Willdomino*, 272 U. S. 718; *St. Johns Corp.* v. *Companhia Geral, etc.*, 263 U. S. 119; *Mobile & Montgomery Ry.* v. *Jurey*, 111 U. S. 584; *Lawrence* v. *Minturn*, 17 How. 111; and see *The Indrapura*, 171 Fed. 929. In any case it is contended that respondent's negligent failure to discover the unseaworthiness of the vessel resulted in the delay which brought her within the operation of the embargo, and that the shipowners are for that reason liable for damages for all the delay, including that immediately resulting from the embargo.

Respondents had purchased the vessel about one month before she sailed. At that time she was unseaworthy, due to a hog or camber in her keel, a structural weakness dangerous to the ship in heavy weather, which later caused the leak and made necessary the repairs at Havana. Following the purchase and before sailing from New Orleans a survey was made by the owner, which appears not to have disclosed her condition, but both courts below agree that the fact of her unseaworthiness could have been discovered by due diligence.

The evidence supports the finding of the court of appeals that the master of the *Baxter* "did not leave New Orleans with knowledge that he would have to make port for repairs, and honestly thought he could make the trip in safety and tried unsuccessfully to do so." The case is therefore not one where the master set sail with the knowledge that the deviation from the voyage, as described in the bill of lading, would ensue, and with the purpose and intent to deviate as in *The Willdomino*, *supra*. There the officers of the vessel, under direction of the owner, sailed from Ponta Delgada, bound for New York, all knowing that the supply of fuel was insufficient for the voyage and intending to take the vessel to North Sidney, and we held that the deviation under the circumstances was voluntary and inexcusable.

But here the deviation was not voluntary and the point to be determined is whether a like effect is to be given to a deviation to avoid perils of the sea, where the deviation would not have been necessary if the owner had used reasonable diligence to start the voyage with a seaworthy vessel.

No sufficient reason is suggested to us for thus extending the rule, nor do we perceive any. Petitioner, without resort to it, is entitled to recover all damages caused by the unseaworthiness. The basis of the privilege of deviation to avoid perils of the sea, is humanitarian. See Carver, Carriage by Sea, (7th ed.) §§ 291, 292. To hold that the master whose ship is in a perilous position must choose between the hazard of continuing the voyage and gaining safety only by forfeiting the contract of affreightment would be a departure from that principle for no purpose except to give the shipper an added and unnecessary protection. "It is the presence of the peril and not its cause" which justifies the deviation. See *Strong* v. *Scott*, 14 App. Cas. 801. This is the conclusion reached in other circuits. *The Turrett Crown*, 297 Fed. 766; *The Turret Crown*, 284 Fed. 439, 445; *The Turret Crown*, 282 Fed. 354, 360; see *The Thessalonia*, 267 Fed. 67; and by the House of Lords in *Kish* v. *Taylor*, *supra*, holding that a deviation caused by unseaworthiness due to improper and negligent loading of the ship by the master did not displace the bill of lading. This rule we adopt as most consonant with the reason and consequences of the rule that a voluntary deviation displaces the contract of affreightment. It follows that the clauses of the bill of lading remain effective and that petitioner may not recover the freight money. *Allanwilde Corp.* v. *Vacuum Oil Co.*, 248 U. S. 377.

But for all damages legally attributable to the breach of warranty of seaworthiness petitioners may recover. *The Caledonia*, *supra*. For the delay caused by the embargo alone petitioners may not recover, both because it was within the exception of the bill of lading and because, while it continued, performance of the contract of affreightment would have been illegal. See *Allanwilde Corp.* v. *Vacuum Oil Co.*, *supra*, 385; Carver, Carriage by Sea, (7th ed.), §§ 237, 238, 343, 344.

It was the embargo and not the unseaworthiness of the vessel which delayed the voyage after the *Baxter* was repaired and ready for sea on January 14, 1918, and the unseaworthiness of the vessel did not cause the embargo. But it is urged that it is enough to

sustain the recovery for the failure to complete the voyage that it was the unseaworthiness, for which respondent was responsible, that brought the vessel within the excepted peril. This view, although not without support, *Green-Wheeler Shoe Co.* v. *Chicago, Rock Island, & Pac. R. R.*, 130 Iowa 123; *Michaels* v. *New York Central R. R.*, 30 N. Y. 564; *Condict* v. *Grand Trunk Ry.*, 54 N. Y. 500, does not generally prevail. See 2 Williston, Contracts, § 1906, and cases cited.

It was rejected by this Court in *Railroad Co* v. *Reeves*, 10 Wall. 176. There negligent delay in the transportation of goods by the carrier brought them within the path of a flood, which caused their destruction. The court held that the flood and not the negligent delay was the proximate cause of the damage and that the rule *causa proxima non remota spectatur* applied to contracts of common carriers as to others. There has been no departure from this rule and we see no reason for departing from it now. See *Milwaukee & St. Paul Ry.* v. *Kellogg*, 94 U. S. 469; *Atchison, Topeka & Santa Fe Ry.* v. *Calhoun*, 213 U. S. 1; *The Indrapura, supra; The Lusitania*, 251 Fed. 715, 732; *The Turret Crown*, 282 Fed. 354, 360. There is no finding, nor is it suggested, that at the time when the contract of affreightment was entered into, or when the vessel broke ground, that the embargo could reasonably have been foreseen, or that there were any special circumstances charging petitioners with the knowledge or expectation that the unseaworthiness or consequent delay would bring the vessel within its operation. The respondent, having brought itself within the exception under its bill of lading, the burden is on petitioners to show that respondents' negligence was the cause of or contributed to the loss. *Railroad Company* v. *Reeves, supra*, 190; *Transportation Co.* v. *Downer*, 11 Wall. 129; see *Southern Ry.* v. *Prescott*, 240 U. S. 632, 641; *Kohlsaat* v. *Parkersburg & Marietta Sand Co.*, 266 Fed. 283, 285.

*Affirmed.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*

459 Republic of France v Transatlantic Corp.

June 23
Aug 17

2. Maritime Hand ~~Campbell~~ ~~not hearing~~ Motion for C & S Dft.

Pltf purchased schooner Malcolm Baxter Jr. which was on New Orleans loading malt tobacco etc. prep'd papers & clears for carriage to Bordeaux in July 17. Rep made an inspection of vessel. Aug 16, 17 she sailed from New Orleans, while waiting at Port Eads mast was discovered. Master decided to proceed to Atlantic seaboard. Storm arose & 5 sails in stay were lost. Sept 1 17 for repairs & was in yard there he was towed to Havana where repairs were completed as soon as possible Jan 7, 18. Sept 29 17 US issued embargo to Bordeaux. ~~Owner~~ Cargo then notified vessel sailed for US Jan 4, 18. was another leak. Steel, lumber & tobacco were restuffed frames, stanch & malt were sold at N.Y.

Pltf filed libels for damages for failure to perform cont.

Respt filed pet. for limitation of and exoneration

pets & others for carriage to Bordeaux on July 17.
Resp made an inspection of vessel. Aug 16, 17 she
sailed from New Orleans, while waiting at Port
Eads a leak was discovered. Master decided to proceed
rather than return. It grew worse & 655 miles on
Atlantic W.S.W. bound Sept 1 17 for repairs as was no yard
there he was towed to Havana where repairs
were completed as soon as possible from 9/18. Sept 29 17
U.S. issued embargo to Bordeaux. ~~Owner~~ Cargo
then notified & vessel sailed for Key West 4/10.
was another leak. Steel, lumber & Tobacco were
discharged from Key, Starch & malt were sold at K.W.

Pets filed libels for damages for failure to perform cont.

Resp filed pets for limitation of and exoneration
from liabilities.

Pets claimed abandonment of voyage due to
unseaworthiness & resultant impossibility.

L/R 301) was ruled in by Am. Bur. of Shipping.
Master left N.O believing it unseaworthy, & found considerable
leak & trouble on ent journey that she was
unseaworthy when she left N.O

Owners did not take proper precautions, denied pet to limit liab
Failed to examine properly.

Boat failed in warranty of seaworthiness
This caused frustration of voyage ; & Pet liable even
tho another cause of frustration intervened
Recover damages from this breach & Freight paid

CCA Findings as to unseaworthiness sustained &
petition to limit liab properly denied & is liable for
consequences of br of warranty of seaworthiness

Boat was on voluntary deviation in making port.
Was not proc. neg. When she left H.O deviation was not
excusable, delay resulted from br of warranty; but
when she was repaired voyage was frustrated by
embargo; not a result of unseaworthiness so that
terms on bill (restraint of princes) apply & no damages
can be allowed on acct of embargo or recovery of prepaid
freight; but for actual damage to walter-starch; & for
diffs between value of goods had they arrived on
stated voyage leaving H.O. Aug 16'17 & on a voyage
leaving Havana Jan 14, 18

Pat. Unseaworthiness not an embargo cause of loss - ~~not ready~~ should have gone before embargo but for unseaworthiness ; so in importation & set up embargo.

Unsecreated

Henry W Camp v Rosario

3 Ruffin Woolley Davis

Puerto Rico, D.C. ch held recovery allowed ret 1/2 fr. + ins. prem - 154.750

Consigned

went from Italy to Norfolk ~~for~~ recovery

shown for goods to Norfolk & C.C. held embargo warranty. she herself wrongly seized - cannot set up as insd. Embargo was consequence of detention.